78-701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

MARVIN MELTZER, et al.,
Petitioners,

versus

BOARD OF PUBLIC INSTRUCTION
OF ORANGE COUNTY, FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No.

MARVIN MELTZER, individually and as father and friend of DAVID MELTZER, et al.,
Petitioners,

versus

BOARD OF PUBLIC INSTRUCTION
OR ORANGE COUNTY, FLORIDA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Circuit Court of Appeals for the Fifth Circuit, entered in this proceeding on July 31, 1978.

OPINIONS BELOW

The opinions of the Court of Appeals (Appendix B, *infra* pp. 6a-9a; Appendix D, *infra* pp. 23a-72a and Appendix F, *infra* pp. 74a-100a), are reported at 480 F. 2d 552, 548 F. 2d 559; and 577 F. 2d 311, respectively.

The opinions of the District Court (Appendix A, *infra* pp. 1a-5a and Appendix C, *infra* pp. 10a-23a) are not reported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 31, 1978. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Does distribution of religious books and religious literature to public school students at designated distribution points on public school premises, with in-class periodic announcement by public school teachers and officials of their availability, violate the Establishment Clause of the First Amendment?

2. Does a state statute requiring public school teachers to "embrace every opportunity to inculcate, by precept and example, the principles of truth, honesty and patriotism and the practice of every Christian virtue," violate the Establishment Clause of the First Amendment?

STATUTORY PROVISIONS INVOLVED

Section 231.09 of the Florida Statutes provides:

231.09 Duties of instructional personnel.

> * * * Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the school board, shall perform the following functions:
>
> (2) Example for pupils. * * * Labor faithfully and earnestly for the advancement of the pupils in their studies, deportment and morals, and embrace every opportunity to inculcate, by precept and example, the principles of truth, honesty and patriotism and the practice of every Christian virtue.

STATEMENT OF THE CASE

The controversy in this case began on August 24, 1970, when the Orange County Board of Public Instruction adopted a resolution which required in every public school a five minute to seven minute morning exercise consisting of "a period of meditation which shall include the opportunity for individual prayer and Bible reading or devotional or meditation presented by groups or organizations or an individual," followed by a patriotic exercise. At the same meeting, a member of the Gideon Camp asked for permission to distribute Gideon Bibles to the students at the public schools. The request was approved (App. D, p. 24a; references to the Appendix are designated by the letter "a").

At the next meeting of the Board, on September 15, 1970, Petitioners complained that the August 24 resolution violated their religious rights. The Board deferred action on the complaints until it could conduct a survey to determine exactly how the August 24

resolution was being implemented and to obtain the opinion of its counsel regarding the legality of those policies and their implementation (App. D, pp. 24a-25a).

At the third Board meeting, held on September 28, 1970, the survey ordered in the September 15 meeting was released. This survey revealed that 70 of the 97 schools in Orange County were practicing daily Bible reading, generally read aloud to a class by a student or classroom teacher. In some public schools, the Bible reading was given over the school public-address system. In some, the Lord's Prayer was recited. The survey showed that only four of the County's 97 schools had neither prayer nor Bible reading. By way of justification, at this meeting, counsel for the Board gave his opinion that the morning exercises were not illegal, relying in part on Chapter 231.09(2) of the Florida Statutes, he said:

> "The policy aids school officials to carry out their specific duties set forth in 231.09 among which are to 'inculcate, by precept and example . . . the practice of every Christian virtue . . .' Those who feel that the policy is unconstitutional should bring their case to Court."

The Board thereupon refused to modify its policy regarding opening day exercises or to direct any change in its implementation (App. D, pp. 25a-26a).

During this period, the Gideon Society commenced distribution of Gideon Bibles to the public school children of Orange County. Approximately 15,000 Bibles were distributed by members of the Gideon Camp who

"walked into classrooms, asked the children who would like a free Bible and passed out the Bibles to the children who raised their hands . . ." In an effort to quell the cries of protest of Petitioners and others, the Orange County School Board adopted Guidelines on October 7, 1970, ". . . for handling of religious books or doctrine offered to the schools for free distribution . . ." (App. F, pp. 78a-79a). An additional 33,000 Bibles were distributed by the Gideon Society during the several weeks following the promulgation of the guidelines (App. C, p. 14a).

On October 16, 1970, thirty-nine parents of children attending the Orange County public schools filed suit in the United States District Court challenging these activities. The complaint sought both declaratory and injunctive relief and at the same time challenged the constitutionality of §231.09(2) of the Florida Statutes. The complaint was dismissed by the District Court (App. A, pp. 1a-5a) but on appeal to the Fifth Circuit Court of Appeals the decision was reversed and the case remanded. (App. B, pp. 6a-10a).

On remand, the complaint was again dismissed by the District Court (App. C, pp. 10a-23a), and again this dismissal was reversed by a panel of the Fifth Circuit Court of Appeals (App. D, pp. 23a-72a). Rehearing was granted *en banc* and the full Fifth Circuit divided evenly and affirmed in part and reversed in part the earlier decision by the panel of that Court.

REASONS FOR GRANTING THE WRIT

The affirmance by the Court of Appeals of the District Court's decision in respect to the two questions on which this petition is based leaves the relevant law in a state of uncertainty and confusion which can be effectively dealt with only by this Court. Since the affirmance by the Court of Appeals does not constitute binding precedent as to either of the issues brought to it for determination, other District Courts in the Circuit are at liberty to decide contrary to the judgment of the District Court for the Middle District of Florida in respect to either or both of the unanswered questions. One District Court may hold that religious literature distribution was unconstitutional but Christian virtues teaching is constitutional. Another may hold the former constitutional but the latter unconstitutional. Another may hold both constitutional and another may hold both unconstitutional. In each of these instances appeal to the Court of Appeals would result in the same *per curiam* affirmance as experienced in the present suit. The situation is one which clearly calls for intervention by this Court.

Such intervention is justified by at least two of the conditions for review set forth in Part V. of the Rules of this Court. To the extent that the affirmance by the Court of Appeals of the District Court's judgment has decided the questions before it, it has decided them in a way in conflict with the applicable decisions of this Court. To the extent that it has not decided the questions before it, the controversy presents important questions of federal constitutional law which clearly calls for this Court's intervention, since as a

practical matter, there is no other way in which these questions can be decided.

I. The Court of Appeals decided the federal question in a way in conflict with the applicable decisions of this Court.

In earlier decisions this Court had defined the Establishment Clause as forbidding laws which aid one religion or aid all religions. *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947). In later decisions this principle has been expressed in somewhat different language. The Court has held violative of the Establishment Clause laws having a purpose or primary effect of either advancing or inhibiting religion, or which foster excessive government entanglement with religion. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Meek* v. *Pittenger*, 421 U.S. 349 (1975). Whichever test is applied, neither the guideline respecting distribution of religious books nor the statute requiring the teachers to inculcate the practice of every Christian virtue can withstand constitutional challenge.

A. *Distribution of Religious Literature*

Every judicial decision relating to distribution of the Gideon Bible to public school students at the elementary or secondary school levels has been to the effect that the practice is violative of the Establishment Clause. The leading case on this question is *Tudor* v. *Board of Education*, 14 N.J. 31, 100 A. 2d 857, certiorari denied *sub nom. Gideons International* v. *Tudor*, 348 U.S. 816 (1953). The opinion of Chief Justice Vanderbilt of the New Jersey Supreme Court in that

case fully considers the arguments relevant to the issue and reaches the conclusion that the practice cannot be reconciled with the mandate of the Establishment Clause. That decision and the New Jersey court's reasoning was followed in *Goodwin* v. *Cross County School District*, 394 F. Supp. 417 (E.D. Ark. 1973), and *Brown* v. *Orange County Board of Public Instruction*, 155 So. 2d 371 (Fla. Sup. Ct., 1963).

In his opinion for a unanimous court in *Tudor*, Justice Vanderbilt said:

> We cannot accept the argument that here, as in the *Zorach Case*, the State is merely "accommodating" religion. It matters little whether the teachers themselves will distribute the Bibles or whether that will be done by members of the Gideons International. The same vice exists, that of preference of one religion over another. This is all the more obvious when we realize the motive of the Gideons. Its purpose is "to win men and women for the Lord Jesus Christ, through . . . (e) placing the Bible — God's Holy Word . . . or portions thereof in hotels, hospitals, schools, institutions, and also through distribution of same for personal use." The society is engaged in missionary work, accomplished in part by placing the King James version of the Bible in the hands of public school children throughout the United States. To achieve this end it employs the public school system as the medium of distribution. It is at the school that the pupil receives the request slip to take to

> his parents for signature. It is at the school that the pupil actually receives his Gideon Bible. In other words, the public school machinery is used to bring about the distribution of these Bibles to the children of Rutherford. In the eyes of the pupils and their parents the Board of Education has placed its stamp of approval upon this distribution and, in fact, upon the Gideon Bible itself. * * *

In the present case, the Orange County Board of Public Instruction in its Guidelines speaks of "religious books or doctrine", rather than specifically of the Gideon Bible, and the District Court accepted this as justifying its decision not to follow *Tudor*.

This, we submit, does not constitute a valid basis for distinguishing the Tudor case from the instant one, since the Establishment Clause forbids not merely preferential aid to advancement of or entanglement with one religion but no less in respect to all religions. Every decision of this Court striking down as violative of the Establishment Clause statutes providing aid to religion involved statutes which provided aid to all religions equally and in no case did the Court intimate that this fact was in any way material or relevant. See, e.g., *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973).

B. Teaching of Christian Virtue

If the ban on the establishment of religion has any meaning in respect to public school instruction it cer-

tainly means that it forbids the teaching and "practice of every Christian virtue." *McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968). In the last cited case, the Court held violative of the Establishment Clause a state statute forbidding the teaching in the public schools any theory (such as evolution) which was contrary to the Biblical doctrine of the creation of man. In *Brown* v. *Thompson*, ___ U.S. ___, 98 S. Ct. 1515 (1978), the Court enjoined, at least temporarily, enforcement of the order of a state governor for the lowering of state flags on Good Friday in commemoration of the crucifixion of Jesus. In *Davis* v. *Beason*, 133 U.S. 333 (1890) the Court said:

> * * * The First Amendment of the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes or worship of any sect . . . With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief of those subjects, no interference can be permitted, provided always

> the laws of society, designed to secure its peace and prosperity, and the morals of its people are not interfered with * * *.

"The law," the Court said in *Watson* v. *Jones* (80 U.S. 679 [1872]), "knows no heresy, and is committed to the support of no dogma, the establishment of no sect." In *Burstyn* v. *Wilson*, 343 U.S. 495 (1952), it held that a state could not, consistent with the First Amendment, legislate against sacrilege. In *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), it said:

> * * * As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. * * *

Should there be any doubt that the purpose of the Christian virtue provision in the challenged statute was the advancement of religion, that doubt is removed by its location and history. Originally, the statute was numbered Sec. 231-09(3) of the Florida Statutes, immediately following Section 231.09(2), which dealt with Bible reading and prayer recitation in the public schools. After this Court, in the case of *Chamberlin* v. *Dade County Board of Public Education*, 377 U.S. 402 (1964), held the prayer and Bible reading provisions unconstitutional, the Christian virtues statute was moved up and took its place as Sec. 231.09(2).

In the light of this legislative history and of the Court's decisions and many others that could be cited, it is difficult to see how the court below could uphold, even by an evenly divided vote, a law subjecting children (required by law to attend school and thus constituting a captive audience) to the inculcation of Christian teaching and practice.

II. The controversy presents important questions of federal constitutional law for this Court's intervention.

Even if we are in error in suggesting that the District Court's judgment decided the questions before it in a way in conflict with the applicable decisions of this Court, it can hardly be doubted that the controversy in this case presents important questions of federal constitutional law that call for this Court's intervention. (Mootness cannot seriously be maintained when the Court of Appeals held distribution of Gideon Bibles in the classroom to be unconstitutional but refused to so hold with regard to distribution pursuant to the Guidelines. See App. F, *Steffel* v. *Thompson*, 415 U.S. 452 (1974)). The decisions we have heretofore cited all point to a resolution contrary to that reached by the Court of Appeals through its affirmance of the District Court's decision. But even if that were not so, the questions raised go to the heart of the meaning and application of the Establishment Clause as it relates to religion in public education.

As we have indicated above, only this Court can resolve the important questions raised in this case and thus eliminate the doubt and confusion resulting

from the lower courts' judgments. Absent such resolution, legislators, public school administrators and teachers not only in Florida or in the Fifth Circuit, but throughout the nation will remain in doubt as to the constitutional boundaries which limit their powers to impose their own religious predilections upon public school children through the mandates of state compulsory school attendance statutes.

CONCLUSION

For the reasons set forth herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Jerome J. Bornstein
125 South Court Avenue
Orlando, Florida 32801
Attorney for Petitioners

CERTIFICATE OF SERVICE

I, Jerome J. Bornstein, attorney for petitioners in the foregoing application for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ____ day of October, 1978, I served three copies of the foregoing petition for writ of certiorari on the following:

(1) Hon. Robert Shevin
Attorney General
Department of Legal Affairs
725 South Calhoun Street
Tallahassee, Florida 32304

(2) William M. Rowland, Jr.
Rowland, Bowen & Thomas
P.O. Box 305
Orlando, Florida 32304

by depositing same in the United States Mail, postage prepaid, and properly addressed.

I further certify that all parties required to be served have been served.

JEROME J. BORNSTEIN

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARVIN MELTZER, et al,
Plaintiffs,

versus No. 70-217-ORL-CIV.

BOARD OF PUBLIC INSTRUCTION
OF ORANGE COUNTY, FLORIDA, et al,
Defendants.

ORDER

Filed: May 24, 1972

This case is before this Court on whether a three-judge court should be convened, as requested by the plaintiffs, to test the constitutionality of F.S. 231.09(02). Numerous hearings have failed to evidence enforcement by the state of the challenged provision. The offending section, with the first paragraph of section 231.09, reads as follows:

> "231.09 Duties of instructional personnel. Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the school board, shall perform the following functions:

* * *

(2) Example for Pupils — Labor faithfully and earnestly for the advancement of the pupils in their studies, deportment and morals, and embrace every opportunity to inculcate, by precept and example, the principles of truth, honesty and patriotism and the practice of every Christian virtue."

The word "Christian" in the phrase "the practice of every Christian virtue" is the word to which plaintiffs object and why they seek a declaratory judgment declaring the whole section "illegal and void on its face".

As set forth in previous orders (December 4, 1970 and December 8, 1971), the conduct[1] of the defendants — concerning which the plaintiffs complained — ceased after the filing of this suit and this Court's delineation of the applicable law in its order of December 4, 1970, so that the only remaining issue is plaintiffs' challenge to the wording of F.S. 231.09(2).

This Court called for briefs to determine the applicability of *Younger* v. *Harris*, 1971, 401 U.S. 37 to requesting a three-judge court in this case. Plaintiffs contend the very existence of the statute requires this Court to act and entitles them to the relief they seek: the striking of the word "Christian" from a statute which is not being enforced in the way that would offend plaintiffs. But in *Younger* v. *Harris*, supra, Mr. Justice Black, speaking for the Supreme Court, said:

1 That conduct was based on a Resolution of the Board of Public Instruction which was changed to comply with the law.

"Beyond all this is another, more basic consideration. Procedures for testing the constitutionality of a statute 'on its face' in the manner apparently contemplated by Dombrowski, and for then enjoining all action to enforce the statute until the State can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury* v. *Madison*, 1 Cranch 137 (1803). But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them. Ever since the Constitutional Convention rejected a proposal for having members of the Supreme Court render advice concerning pending legislation it has been clear that, even when suits of this kind involve a 'case or controversy' sufficient to satisfy the requirements of Article III of the Constitution, the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary . . . ."

Counsel for plaintiffs contend that *Younger* v. *Harris* is limited to a cause challenging the constitutionality of a state statute *after* an arrest has been made and state prosecution commenced. That interpretation would ignore the reasoning for the *Younger* v. *Harris* decision. The Fifth Circuit Court of Appeals in a recent decision, *Steffel* v. *Thompson*, ___ F. 2d ___ (May 3, 1972) construed *Younger* to apply to threatened proceedings as well as pending ones. *Younger* and *Steffel* both concerned criminal cases whereas the case at bar concerns a civil adjudication only. Whether a further extension of *Younger* into civil litigation is warranted need not be decided here in order to determine the issue before this Court.

The availability of declaratory relief depends on the situation at the time of the hearing and not upon the situation when the federal suit was initiated. *Golden* v. *Zwicker*, 394 U.S. 103 (1968). As previously noted, at the time of the hearings it was apparent plaintiffs' only complaint is with the way in which the statute is written and not with its present application. This Court determines, therefore, that on the remaining issue, as previously herein delineated, there is no present case or controversy requiring submission to a three-judge court.

As to the issues resolved by this Court's order of December 4, 1970, prompt compliance has long ago dissolved the basis for that controversy; it is therefore,

ORDERED that the request for a three-judge court be and is hereby denied; and it is further,

ORDERED that this cause be dismissed by the entry of a separate judgment for plaintiffs providing for continued compliance by defendants with the rulings set forth in this Court's order of December 4, 1970.

DONE and ORDERED in Chambers at Orlando, Florida, this 24th day of May, 1972.

/s/ GEORGE C. YOUNG
UNITED STATES DISTRICT JUDGE

JUDGMENT

(Number and Title Omitted)

Filed: May 24, 1972

Judgment is hereby entered for the plaintiffs in that the defendants are directed to continue to comply with the rulings set forth in this Court's order of December 4, 1970, which by this reference is made a part hereof. In all other respects plaintiffs prayer for relief is denied.

DONE and ORDERED in Chambers at Orlando, Florida, this 24th day of May, 1972.

/s/ GEORGE C. YOUNG
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2614

MARVIN MELTZER, Individually, and as father and next friend of DAVID MELTZER, ET AL.,
Plaintiffs-Appellants,

versus

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, Etc., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

(June 5, 1973)

Before AINSWORTH, GODBOLD and CLARK, Circuit Judges.

PER CURIAM: This action was brought by 39 parents of children attending the public schools of Orange County, Florida, complaining of certain ac-

tivities of the school system which the plaintiffs believe violate the religious freedom guarantees of the First Amendment. The parents complain that the daily opening exercises conducted in Orange County Public School System constitute a religious observance. In addition, plaintiffs contend that the school system improperly participated in the distribution of Gideon Bibles to students on the school campus. The plaintiffs' last attack is on the constitutionality of Section 231.09(2) of the Florida Statutes, which in literal terms requires the teaching of "Christian virtue."[1] We remand to the district court with directions to bring the record up to date and make additional findings of fact and conclusions of law.

The several orders of the district court, while concluding that the school's activities are not inconsistent with constitutional standards, make no findings of fact as to the nature of these day-opening devotional or inspirational exercises. Thus, on the record before us, we cannot determine whether or not the practices are prohibited by the Constitution. *See Hawkins v. Coleman*, ___ F.2d ___ (5th Cir. 1973) [No. 72-2190,

---

1 The statute reads as follows:

231.09 Duties of instructional personnel

Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the school board, shall perform the following functions:

. . .

(2) Example for pupils. — Labor faithfully and earnestly for the advancement of the pupils in their studies, deportment and morals, and embrace every opportunity to inculcate, by precept and example, the principles of truth, honesty and patriotism and the practice of every Christian virtue.

. . .

April 2, 1973]. Nor has the court furnished us any guide as to the nature or extent of the school system's participation in the distribution of Gideon Bibles to school children on campus.

In addition, the plaintiffs sought the appointment of a three-judge district court to review the constitutionality of Fla. Stat. § 231.09 (2). After first indicating that a request would be submitted to the Chief Judge of the circuit for designation of a three-judge court, the district court reversed its position and found that there was no case or controversy requiring submission to a three-judge court. In so ruling it concluded that "plaintiffs' only complaint is with the way in which the statute is written and not with its present application." Counsel for plaintiffs has been unable to direct this court's attention to any facts tending to show that the statute has been or will be applied. In short, the plaintiffs have made no showing whatsoever of any foreseeable irreparable injury which would merit injunctive relief. Construing the three-judge court statutes strictly and technically as we must, *Phillips v. United States*, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941), we therefore affirm the decision of the district court that the complaint does not raise a substantial constitutional question requiring the convening of a three-judge court. *See Hunt v. Rodriguez*, 462 F.2d 659, *on rehearing*, 468 F.2d 615 (5th Cir. 1972); *Tyler v. Russel*, 410 F.2d 490 (10th Cir. 1969).

Insofar as the complaint seeks a judgment declaring the statute unconstitutional, as opposed to injunctive relief, the cause must be remanded to the district court. Having properly determined that the face of the com-

plaint would not support injunctive relief and thus that there was no necessity for three-judge action, the single district judge had jurisdiction to consider the plaintiffs' other non-statutory claims and the prayer for a declaratory judgment as to the invalidity of the statute. *Lyons v. Davoren*, 402 F.2d 890 (1st Cir. 1968), *cert. denied*, 393 U.S. 1081, 89 S.Ct. 861, 21 L.Ed.2d 774 (1969). The court's order of May 24, 1972, though couched partly in terms of the appropriateness of declaratory relief, resolved only the question that "there is no present case or controversy *requiring submission to a three-judge court*." (Emphasis added.) On remand the court shall bring the record up to date so that it can determine whether there is an actual case or controversy now existing such as would invest the cause with a minimum constitutional jurisdiction base to permit adjudication of the prayer for declaratory relief. We express no opinion whatsoever as to whether the necessary substantial controversy between adverse litigants exists here.

Finally, if single judge injunctive relief appears appropriate, the district court must clarify the requirements of the May 24, 1972, order providing for "continued compliance by defendants with the rulings set forth in this court's order of December 4, 1970." As it now stands, this provision fails to meet the requirements of F.R.Civ.P. 65(d), which requires *inter alia* that injunctive orders "describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained."

AFFIRMED in part,
VACATED in part,
and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARVIN MELTZER, et al,
Plaintiffs,

versus No. 70-217-ORL-CIV.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, et al,
Defendants.

OPINION

Filed: Jan. 22, 1975

This cause came before the Court for a further hearing of evidence and argument in accordance with the direction of the Fifth Circuit Court of Appeals in *Meltzer, et al.* vs. *Board of Public Instruction of Orange County, Florida*, reported at 480 F. 2d 552 (5th Cir. 1973).

The relief sought in the complaint and pursued throughout this litigation has related to three separate alleged violations of the Establishment Clause of the First Amendment to the Federal Constitution, which in pertinent part, provides:

> "Congress shall make no law respecting an establishment of religion . . . ."

The Supreme Court has decisively and repeatedly ruled that the Establishment Clause of the First Amendment is wholely applicable to the states through the Fourteenth Amendment. See discussion in *Abington School District* v. *Schempp*, 374 U.S. 203 at 215-216, 10 L. Ed. 2d 844 (1963), (hereinafter referred to as "Schempp"). Specifically the plaintiffs claim that:

I. The morning exercises conducted in the schools pursuant to the policy of the defendant school board are unconstitutional;

II. The distribution of Gideon Bibles in schools is unconstitutional; and

III. Section 231.09(2) of the Florida Statutes is unconstitutional.

In keeping with the direction of the Fifth Circuit, this Court considered the issues raised in this case first in terms of the situation at the time of filing and secondly in the light of current events.

I. The Opening Exercises

On August 24, 1970, the defendant school board adopted a policy resolution on opening exercises in elementary and secondary schools which required a five to seven minute "period of meditation", including "the opportunity for individual prayer and Bible reading or a devotional or meditation", followed by a

flag salute and then the singing or playing of a patriotic song.

Evidence showed that the individual classroom teachers — pursuant to the resolution — conducted different types of activities, varying from school to school and class to class within the same school. In many instances there was Bible reading by the teachers. In many instances the teachers led the students in sectarian group prayer, such as the Lord's Prayer, or songs such as:

> "Father, hear our morning prayer
> This day keep us in thy care
> All we do and all we say
> May it be our best today. Amen".

In other classrooms the teachers read from Bible story books, while in certain of the classrooms the exercises were conducted with no reference to the Bible and no prayers were conducted. Some teachers preferred inspirational readings on the founding and development of the Republic, or selected poems. In some classes there were periods for silent prayer, or meditation. The exercises closed with the singing of a patriotic song such as "America the Beautiful" or "This Land is Your Land".

Subsequent to the filing of this suit the defendants modified their policy so that the exercises were to be characterized as "inspirational", rather than "devotional". This Court held in its order of December 4, 1970 that Bible reading as a means of sectarian religious instruction and school sponsored prayer

were prohibited by prior rulings of the United States Supreme Court. As a result, the activities objected to by plaintiffs ceased and counsel for plaintiffs conceded at the most recent hearing on this matter that no violations involving either prayer or Bible reading have occurred, and that defendants are neither directing nor sponsoring impermissible activities at this time.

This Court finds therefore that the defendants have not engaged for the past four years in any devotional-type activities sought to be enjoined by the plaintiffs. This Court further finds there is no likelihood of a resumption of any such proscribed activities.

II. Distribution of Gideon Bibles

On August 24, 1970, the defendant school board passed a motion permitting a member of the Gideon Society to make distribution of the "Gideon Bible" to students, fifth grade and up, in the Orange County School System. On October 7, 1970, the district superintendent promulgated guidelines on the "handling of religious books, doctrine, or literature". According to these guidelines, which were to be strictly followed, any literature of a religious type was to be made only through a central distribution point; all faiths were to be allowed to distribute books; public announcement was to be made of the availability of the literature; and no school employee was to comment on the decision of any group to make available or not to make available literature, "or in any way influence others concerning the literature or concerning the taking or reading of the literature."

From the evidence, this Court finds that some 15,000 Gideon Bibles were distributed to pupils in individual classrooms before the policy guidelines, outlined above, were promulgated. Approximately 33,000 additional bibles were distributed through the central distribution technique contemplated by the guidelines.

This Court's order of December 4, 1970 pointed out that a Florida State Court of Appeals in the case of *Brown* v. *Orange County Board of Public Instruction*, 128 So. 2d 181 (2nd DCA, 1960) had held that a complaint by parents against the school board for permitting distribution of Gideon Bibles through the school system stated a claim of school board action which "approximates an annual promotion and enforsement of the religious sects or groups which follow its teachings and precepts."

Following the December 4, 1970 order the defendants altered their policy as to distribution of Gideon Bibles. This Court now finds there has been no Bible distribution in the Orange County School System since December 4, 1970 and there is no indication that such practice will be resumed.

III. *Attack on the statute*

The plaintiffs originally sought injunctive and declaratory relief from certain of the provisions of Section 231.09, which reads as follows:

> 231.09 Duties of instructional personnel
> Members of the instructional staff of the

> public schools, subject to the rules and regulations of the state board and of the school board, shall perform the following functions:
>
> . . .
>
> (2) Example for pupils. — Labor faithfully and earnestly for the advancement of the pupils in their studies, deportment and morals, and embrace every opportunity to inculcate, by precept and example, the principles of truth, honesty and patriotism and the practice of every Christian virtue.
>
> . . .

The plaintiffs object to the word "Christian" as it appears in F.S. 231.09(2).

In accord with their claim for injunctive relief, the plaintiffs requested the convening of a three-judge court, pursuant to 28 U.S.C. §2281. This section precludes a single federal judge from entering an injunction "restraining the enforcement, operation, or execution of any state statute"; except where a substantial constitutional question is not in controversy, ". . . not only when the claim was simply a frivolous attack on the constitutionality of a statute, but also when the unconstitutionality of a statute [is] obvious." *Gates* v. *Collier*, 501 F. 2d 1291, 1297 (5th Cir. 1974).

This Court earlier found in a May 24, 1972 order that there was no evidence that the statute was then being enforced in a way that would offend plaintiffs. In the

absence of any application of this statute, this Court concluded that no case or controversy existed which required a submission to a three-judge panel. Likewise, the plaintiffs were unable to demonstrate on appeal "any foreseeable irreparable injury which would merit injunctive relief." 480 F. 2d at 554. In this case, there was simply no activity based upon the statute to enjoin. Consequently, there was no substantial constitutional question involved warranting a three-judge court to consider injunctive relief.

IV. *Appropriate Relief.*

(a) *As to Opening Exercises and Bible Distribution.*

At the recent hearing on this matter, counsel for the plaintiffs argued strenuously that a permanent injunction should be entered, restraining the defendants from future violation of the First Amendment. In view of this Court's finding that insofar as the proscribed manner of prayer and Bible reading and distribution are concerned, the defendants have not for the past four years and are not now violating the decisions of the Supreme Court as to what is prohibited by the federal constitution, the stringent judicial remedy of injunctive relief is not required; the plaintiffs have long ago secured the relief they sought and to which they are entitled.

(b) *As to Attack on Statute.*

Even though injunctive relief against the application of the statute was not appropriate, and thus no

need existed to convene a three-judge court, this Court could still enter a declaratory judgment as to the constitutionality of the statute. See *Lyons* v. *Davoren*, 402 F. 2d 890 (1st Cir. 1968). The distinction between injunctive relief under the three-judge court act and declaratory relief under 28 U.S.C. §2201 and §2202 was recently examined, in a criminal context, by the United States Supreme Court in *Steffel* v. *Thompson*, 39 L. Ed. 2d 505 (1974). There Mr. Justice Brennen, speaking for the Court held:

> ". . . regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied."
>
> 39 L. Ed. at 524.

In addition, Mr. Justice Brennan examined the threshold question raised by the "case or controversy" requirement of Article III of the Federal Constitution, and the express terms of the Federal Declaratory Judgment Act.

He found that unlike three of the appellees in *Younger* v. *Harris*, 401 U.S. at 41, 27 L. Ed. 2d 669, petitioner in *Steffel* had alleged threats of prosecution that could not be characterized as imaginary or speculative. The importance of meeting this threshold

question was emphasized by Mr. Justice Stewart's separate opinion (with whom Chief Justice Burger concurred) in which he held that:

> "Our decision today must not be understood as authorizing the invocation of federal declaratory judgment jurisdiction by a person who thinks a state criminal law is unconstitutional, even if he genuinely feels 'chilled' in his freedom of action by the law's existence, and even if he honestly entertains the subjective belief that he may now or in the future be prosecuted under it."
>
> . . .
>
> "The petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest of his companion, has created a concrete controversy between himself and the agents of the state."
>
> 39 L. Ed. 2d 524.

This Court concludes that in the absence of any evidence of present or likelihood of future enforcement of the statute adverse to the position of the plaintiffs, the plaintiffs' concern over the statute's infringement on First Amendment rights is "imaginary or speculative" and that the case does not present "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment". *Maryland Casualty Co.* v. *Pacific Coal and Oil Co.*, 312 U.S. 270, 273, cited in *Steffel* at 39 L. Ed. 2d 515.

Furthermore, the statute is susceptible to varied interpretations. The plaintiffs are concerned with one possible interpretation: that the duty to teach every Christian virtue requires instruction to students as to the Christian religion — for example, the immortality of Jesus Christ. Given this possible construction, the statute would no doubt be unconstitutional. But no court, state or federal, has so construed the statute. There is not a scintilla of evidence in the record that the defendant school board or any other agency or authority is so applying the statute. It is a fundamental tenet of statutory construction that when a law is susceptible to more than one interpretation, the construction limiting the law to constitutionally permissible bounds should be applied. The virtues of honesty, unselfishness, truthfulness, kindness, and fair, equitable and decent treatment to all our brethren are easily distinguishable from the religious beliefs of a particular sect.

This Court does not, however, make any such construction of the statute, as it finds — as noted above — that the plaintiffs' fears are imaginary and speculative. Thus, since the Article III requirement of a concrete controversy, affecting the legal interests of the parties, has not been shown here, this Court has no jurisdiction to hear the statutory attack. See *Brown & Root, Inc.* v. *Big Rock Corp.*, 383 F. 2d 662 (5th Cir. 1967). Consequently it would be inappropriate for this Court to interpret the statute; that must await a genuine case or controversy arising in a Florida or federal court.

An examination of the pages of history will quickly reveal the basis for the concern of plaintiffs. In the absence of such examination and knowledge of past events it may be difficult for some to understand or appreciate that concern. We have had in the United States almost two hundred years of separation of state and religion so that, absent historical research, the cruel and horrible practices performed in the name of religion are not cognizable. But those groups whose ancestors were frequently the victims of sectarian bigotry are understandably alert to any possibility of state interference in religion. Such concern and consequent actions stemming from it should not be misunderstood, or disapproved. The very preservation of free observance of all individual beliefs, whether it be Judism, Christianity — both Catholic and the various sects of Protestantism, Buddhism, agnosticism or any other, depends on continued separation of government and religion.

While the basic principal of the First Amendment has an historical and continuing current basis for diligent and strict observance, its application to all possible circumstances cannot be set forth in words carved in stone.

As Chief Justice Burger has said:

> ". . . The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed

> governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsoring and without interference.
>
> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice."

Waltz v. *Tax Commission of the City of New York*, 397 U.S. 644, 669-670, 25 L. Ed. 2d 697 (1970).

In this case this Court has concluded that the type of neutrality referred to by Chief Justice Burger in *Waltz* has been obtained in the Orange County School system as to all issues raised in this case. Consequently, no further action by this Court is required.

Before concluding, it should be emphasized that the decision of this Court from the bench at the conclusion of the last hearing on January 8, 1975 and as here confirmed is *not* either (1) a ruling that state sponsored prayer, state sponsored Bible reading or state sponsored distribution of Bibles or state sponsored

teaching of the Christian religion is permissible under the law or (2) a ruling that this Court refuses to enjoin any one or more of the acts objectionable to plaintiffs if such acts were in fact now being performed or likely to be performed.

Briefly stated this Court's ruling is that the defendants are not engaging in the acts complained of — there is no imminent threat of future violation so an injunction is not necessary and declaratory relief is not appropriate where no genuine case or controversy exists.

Consequently, by separate order this case will be dismissed.

DATED at Orlando, Florida, this 22nd day of January, 1975.

/s/ GEORGE C. YOUNG
Chief Judge

JUDGMENT

(Number and Title Omitted)

In accordance with the Opinion filed simultaneously herewith, it is,

ORDERED that the prayers of the plaintiffs for injunctive relief and for a declaratory judgment be and are hereby denied; and it is further,

ORDERED that this case be and is hereby dismissed.

DONE and ORDERED in Chambers at Orlando, Florida this 22nd day of January, 1975.

/s/ GEORGE C. YOUNG
Chief Judge

APPENDIX D

Marvin MELTZER, etc., et al.,
Plaintiffs-Appellants,

versus

BOARD OF PUBLIC INSTRUCTION
OF ORANGE COUNTY, FLORIDA, etc., et al.,
Defendants-Appellees.

No. 75-1423.

United States Court of Appeals,
Fifth Circuit.

March 11, 1977.

Appeal from the United States District Court for the Middle District of Florida.

Before BROWN, Chief Judge, and TUTTLE and GEE, Circuit Judges.

JOHN R. BROWN, Chief Judge:

In this, their second visit[1] to the Court of Appeals in this case, the plaintiff-appellants, parents of children attending public schools in Orange County, Florida, appeal from the dismissal of their case by the District Court. We find that the District Court properly denied injunctive relief to plaintiffs, but improperly denied declaratory relief. Accordingly, we reverse.

The Board Meetings

The facts of this case are undisputed. On August 24, 1970, Defendant, the Orange County Board of Public Instruction, held a meeting and adopted a resolution calling for a five minute to seven minute morning exercise in every school to consist of "a period of meditation which shall include the opportunity for individual prayer and Bible reading or devotional or meditation presented by groups or organizations or an individual," followed by a patriotic exercise. At the same meeting, a member of the Gideon Camp asked for permission to distribute Gideon Bibles to the students at the public schools. The request was approved.

At the next meeting of the Board, on September 15, 1970, the eventual plaintiffs in this case complained to the Board that the August 24 resolution violated their religious rights. The Board deferred action on the

1 The first was *Meltzer v. Bd. of Pub. Instruction of Orange County, Florida*, 5 Cir., 1973, 480 F.2d 552.

complaints until it could conduct a survey to determine exactly how the August 24 resolution was being implemented and to obtain the opinion of its counsel regarding the legality of those policies and their implementation.

At the third Board meeting, the survey ordered in the September 15 meeting was released. This survey revealed that 70 of the 97 schools in Orange County were practicing daily Bible reading, generally read aloud to a class by a student or the classroom teacher. In some public schools, the Bible reading was given over the school public-address system. In some, the Lord's Prayer was recited. The survey showed that only four of the County's 97 schools had neither prayer nor Bible reading.

At this meeting, eventual plaintiffs repeated their complaints about the devotional and the distribution of Gideon Bibles. Counsel for the Board, however, gave his opinion that the morning exercises were not illegal, citing in part Chapter 231.09(2) of the Florida Statutes:[2]

> "The policy aids school officials to carry out their specific duties set forth in 231.09 among

2 Chapter 231.09(2) of the Florida Statutes provides:

231.09 Duties of instructional personnel. — Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the school board, shall perform the following functions:

(2) *Example for pupils.* — Labor faithfully and earnestly for the advancement of the pupils in their studies, deportment and morals, and embrace every opportunity to inculcate, by precept and example, the principles of truth, honesty and patriotism and the practice of every Christian virtue.

which are to 'inculcate, by precept and example . . . the practice of every Christian virtue . . . .' Those who feel that the policy is unconstitutional should bring their case to Court."

The Board thereupon refused to modify its policy regarding opening day exercises or to direct any change in its implementation.

On October 7, 1970, the Board issued guidelines concerning the distribution of Bibles or other religious literature.[3]

3 TO:
ALL ORANGE COUNTY PUBLIC SCHOOL PRINCIPALS
FROM:
JAMES M. HIGGINBOTHAM
District Superintendent
SUBJECT:
RELIGIOUS BOOKS AND LITERATURE

The following guidelines have been developed by the School Board Attorneys and apply to the handling of religious books, doctrine, or literature which may be offered to the schools for distribution. These guidelines are to be reviewed by *you* in detail and are to receive *immediate implementation*.

The procedures as contained in the attached guidelines are the only procedures authorized by this office and shall be the sole method of handling material of this nature.

GUIDELINES

The following are guidelines for the principals of the Orange County District School Board schools for handling of religious books or doctrine offered to the schools for free distribution. We emphasize that we are directing these guidelines only toward religious books and doctrine not intending to modify general present policies or guidelines with regard to other literature.

1. A place be designated within the school facility for all religious books and literature which may be supplied by outside groups or organizations.
2. Books and literature be available to the students only at the designated location.
3. All faiths be allowed to provide books and literature under the terms of these guidelines.

The Trial Court — Round I

On October 16, the plaintiffs filed their complaint as a class action, alleging (i) that § 231.09(2) is unconstitutional on its face because it commands the inculcation of *Christian* virtue; (ii) that the August 24 resolution and the morning exercises conducted pursuant to it are unconstitutional; (iii) that the distribution of Gideon Bibles is unconstitutional; and (iv) that a Southern Baptist program at the school planned for October 19 and 20 is unconstitutional, all being in violation of the First Amendment religion clauses, as made applicable to the states through the Fourteenth Amendment. The complaint sought both declaratory and injunctive relief and requested the convening of a three-judge court.[4]

On November 4, 1970, the District Court held a hearing to determine whether a temporary restraining order should issue. The plaintiffs presented the testimony of one parent who complained of the morning exercise; that of two rabbis who testified that read-

4. No distribution nor allowing of distribution of books and literature be undertaken through the classroom, homerooms, in assembly or on any portion of school property by the staff, students or outsiders.
5. Periodic announcements may be made that literature is available at the designated place.
6. No school employee may comment upon the decision by any group to make available or not make available literature, the content of such literature, or in any way influence others concerning the literature or concerning the taking or reading of the literature.

4 Although the complaint was careful to separate the practices complained of from the unconstitutional statute, it also stated that all of Defendant's actions complained of by plaintiff "were in reliance upon, in furtherance of and to implement Chapter 231.09(2) of the Florida Statutes."

ing the Bible to "religious minorities" is harmful to them, especially without interpretation, and that the Bible reading is blasphemous to Jews, even in a secular context because the Bible is inherently religious to Jews; and the testimony of a psychologist, who testified to the detrimental psychological effect on "religious minorities" of having readings from a book of a major religion. During this hearing, the constitutionality of § 231.09(2) was not put in issue.

On December 4, 1970, the District Court issued its order denying the temporary restraining order, on the grounds that the plaintiffs had failed to adduce sufficient evidence to show the possibility of irreparable injury, or to make findings of fact as to the morning exercises and the Bible distribution. However, the order did not stop there, but went on to discuss the legality of Bible reading in the schools. The Court concluded that the school cannot sponsor Bible reading as part of a devotional program, although the school is not required to be hostile to religion. Reference to the Bible as part of an "inspirational" rather than a "devotional" program is permitted under the First Amendment if (i) the reference to the Bible is a voluntary one by an individual student, and (ii) the reference is not school or teacher sponsored. The Court also noted that a Florida case, *Brown v. Orange County Board of Public Instruction*, Fla.App., 1960, 128 So.2d 181, could probably be read to prohibit distribution of Bibles in the schools.[5]

5 The status of these asides by the District Court in the December 4 order was not made clear when delivered. Although not labeled as such, it seems to be a de facto declaratory judgment — a warning to the school board not to go too far in their Bible reading and distribution efforts. The final paragraph of the order gives something of its flavor:

> "The denial of the temporary restraining order is not authority for the Board of Public Instruction to pursue any practices in violation of constitutional law as interpreted by the Supreme Court of the United States and the Florida courts. To the contrary, the Board should make any and all revisions to the wording of its resolution and to the practice thereunder as may be necessary to comply with the law as enunciated by the Supreme Court of the United States and the Florida Courts."

On January 14, 1971, the Defendants filed a statement of compliance[6] with the District Court's order of December 4, but on February 26, 1971, plaintiffs filed a statement alleging that the Board's policy had not been changed and was still in operation.

On March 8, 1971, the District Court held a hearing to determine whether or not Defendants had complied with its December 4 order. In the hearing, the plaintiffs asked the District Court to order the Board to modify its August 24, 1970 resolution concerning morning exercises, and expressed its confidence that a change in the resolution would be sufficient to correct minor illegalities in some of the morning exercises. Defen-

6 STATEMENT OF COMPLIANCE

Come now the defendants pursuant to the Order of this Honorable Court entered on December 4, 1970, and state as follows:

1. Defendants are complying with the Constitutional requirements as set forth in said Order.
2. Defendants will continue to implement the resolution requiring a period of meditation and as further required under the Constitution will not exhibit any hostility to religion and will not promote a religion of secularism so as to show any preference for those who believe in no religion over those who do believe.
3. Acting in the spirit of community harmony, defendants will place all religious literature which may be made available to the Orange County school system only in the libraries of the schools.

dant agreed to change the wording of the resolution from "devotional" to "inspirational."

At the March 8 hearing, the plaintiffs requested a three-judge court to consider the constitutionality of the statute. The defendants argued that they were not the right defendants to sue concerning the statute but the plaintiffs responded that the resolution was passed pursuant to the statute. No action was taken at the hearing by the Court.

On March 16, 1971, defendant filed a second statement of compliance,[7] this time truthfully representing that it had changed the word "devotional" in the resolution to "inspirational." Plaintiff again filed

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7 DEFENDANTS' STATEMENT OF COMPLIANCE

Pursuant to the oral Order of this Honorable Court, entered on March 8, 1971, the Defendants hereby submit the following Statement of Compliance:

1. Based upon the representations of counsel for Plaintiffs made during the hearing held on March 8, 1971, that Plaintiffs sole objection was the adjective "devotional" being in the Defendant Board's policy on opening exercises and that if the Defendants would replace the adjective "devotional" with the noun "inspiration" the Plaintiffs would not continue litigation nor would the Plaintiffs appeal any action of this Honorable Court, and based further upon the subsequent oral Order of this Honorable Court to Defendants to replace the adjective "devotional" with the noun "inspiration," and without admitting in any manner that Defendants have failed to comply with any Constitutional requirements, Defendants state to this Honorable Court that at a regular meeting held on Friday, March 12, 1971, Defendant Board officially amended the wording of its policy on opening exercises by changing the adjective "devotional" to the noun "inspiration."

a statement of noncompliance,[8] disclaiming any agreement not to appeal.

On December 8, 1971, the District Court issued a second order, in which it found that there had been no evidence of any violations in the morning exercises or in the distribution of Bibles since its December 4 order. Therefore, the Court stated, the attack on the statute must await the convening of a three-judge court, which it said it would request.

On May 24, 1972, the District Court issued a third order. The Court apparently changed its mind about convening a three-judge court, and decided to dispose of the issues itself. After discussing the principles of

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8 TRAVERSE TO DEFENDANTS' STATEMENT OF COMPLIANCE

Come now the Plaintiffs, by their undersigned attorneys, and file this traverse to Defendants' Statement of Compliance dated March 15, 1971, and submit the following:

1. Neither Plaintiffs, nor their counsel, have ever represented to the Court, or to Defendants, or to anyone else, that Plaintiffs' "sole objection was the adjective 'devotional' being in Defendant Board's policy on opening exercises . . .", nor have Plaintiffs, or their counsel, represented to this Court, to Defendants herein, or to anyone else that Plaintiffs would not continue this litigation nor appeal any action of this Honorable Court.

2. Plaintiffs filed the above-styled suit for several purposes:

(a) To object to the resolution of Defendant Board of Public Instruction which was an open invitation to the institution of Bible reading, prayer, and other sectarian practices in the public schools of Orange County, Florida;

(b) To object to the actions of Defendant's agents, servants, and employees, by the institution of Bible reading, prayer and other sectarian practices in the Orange County public schools as a result of the aforementioned Resolution, all of which has been proven by Plaintiffs by testimony presented to this Court and included in the depositions filed in the above-styled cause;

Younger v. Harris,[9] the Court decided that *Younger* did not apply in this case. However, the Court held that there was no likelihood that the statute would be enforced, and therefore there was no case or controversy remaining as to the constitutionality of the statute. The Court further stated that the voluntary cessation of misconduct by the Board after the suit was filed deprived the plaintiffs of any right to declaratory relief as to the morning exercises or Bible distribution issues.

The plaintiffs appealed to the Fifth Circuit from the May 24 order and judgment.

(c) To object to the distribution of Gideon Bibles and Youth Testaments in the public schools of Orange County, Florida; and

(d) To challenge the constitutionality of Chapter 231.09(2) of the Florida Statutes.

3. Plaintiffs' counsel has stated to this Court that the correction of the Resolution of the Defendant Board of Public Instruction, adopted August 24, 1970, would be acceptable to Plaintiffs in place of a court order striking down the objectionable portions of such Resolution of Defendant Board of Public Instruction of Orange County was amended to conform to the constitutional requirements set forth by this Court in its Order dated December 4, 1970, and if further violation of the unconstitutional practices followed by the Defendant Board of Public Instruction since the opening of the current school year of 1970 would be enjoined by this Court, all as more specifically alleged in the Complaint filed herein and proven by the evidence before this Court, then and in that event there would be no necessity to appeal that portion of the Complaint which pertains to sectarian practices being followed in the public schools of Orange County, Florida. The determination of whether or not any appeal would be taken in this cause has always been dependent upon the scope of the order of this Court and no representations to the contrary have been made by Plaintiffs, or their counsel, to this Court, or to Defendants herein.

9 *Younger v. Harris,* 1971, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669.

The Court Of Appeals — Round I

On June 5, 1973, the Fifth Circuit decided that the record was deficient, and so remanded the case to the District Court to update the record, make findings of fact on the nature of the morning exercises and the extent of the school system's participation in the distribution of Gideon Bibles, and to clarify the exact nature of the District Court's December 4 order denying a temporary restraining order to which the Board had stipulated it was conforming. *Meltzer v. Board of Public Instruction of Orange County,* 5 Cir., 1973, 480 F.2d 552. On the three-judge court issue, the court held that there was no evidence that the statute had been or would be applied, and thus there had been no showing of irreparable injury necessary to obtain an injunction. Finally, the court remanded to the District Court for a determination of whether the likelihood that the statute would be enforced was so miniscule as to present no case or controversy, thus robbing the District Court of jurisdiction to grant even a declaratory judgment, or whether there was still a case or controversy present even though the danger of harm was not great and imminent enough to warrant an injunction.

The Trial Court — Round II

On December 4, 1973, the District Court held a hearing following remand. At this hearing, the Board moved for dismissal on the grounds that there was no case or controversy presented by the facts. The Court postponed ruling on the motion until the close of the evidence, which consisted of the following. The first witness was one of the plaintiffs, who established con-

tinuing standing. The second witness was defendant's lawyer, who attempted to introduce into evidence his 1970 legal opinion basing the legality of the August 24 resolution on the "Christian virtue" statute. Although the opinion was marked as an exhibit for identification, objection to its admission into evidence was sustained.[10]

The third witness was a school board member, who testified that, although the word "devotional" had been changed to "inspirational", no change in the actual conduct of the morning exercise was ordered. This witness also testified that at a recent Board meeting, the Gideon Camp had again requested the Board's permission to distribute Bibles in the schools. This request was tabled by a four to three vote. The sole reason for tabling the request was to wait for the new legal opinion of defendant's counsel, and defendant's counsel had informed the Board that it wished to wait for the conclusion of the current litigation before issuing an opinion.[11] The witness went on to testify that the motion would be re-opened for consideration as soon as this litigation reached its conclusion and the defendant's attorney gave them a legal opinion.

10 Apparently, the Court refused to let the document into evidence on the ground that anything dated prior to 1973, the date of the Fifth Circuit opinion, was inadmissible for the purpose of determining whether or not a case or controversy existed at the time of this, the December 4, 1973, hearing. It is of course true that whether or not a case or controversy exists is to be determined as of the time of the court's hearing, rather than at the time of the commencement of the action. *Golden v. Zwickler*, 1969, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113. However, it is equally a suit that mere voluntary cessation of misconduct when a suit is filed does not necessarily render a case moot or remove the necessary justiciability. *See, e.g., DeFunis v. Odegaard*, 1974, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164; *United States v. W. T. Grant Co.*, 1953, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303. The crucial test, in an action involving a request for injunctive or declaratory relief, where defendant has voluntarily ceased his allegedly illegal conduct is whether it can be said with assurance that there is no reasonable expectation that the wrong will be repeated. *See* note 13, *infra*. Thus, it was error for the Court to refuse to allow this document into evidence on the ground that it related to events which occurred prior to 1973. The document might have had some bearing on the issue of whether or not there was danger of recurrence of the Board's violations, if any.

The next witness was the Deputy Superintendent of Schools. He testified that there had been no survey taken of morning exercises since the September 1970 survey, but that the Court's December 4 order had been distributed to all principals. He also testified that he had advised the principals that they were "to comply with the policy that was in existence at the present time concerning the opening exercises and that there should be a period of meditation in the school system that would provide the opportunity for individual prayer or Bible reading and inspiration and meditation." He further testified, however, that he did not know whether or not there had been readings of the Bible over the public address system as part of the morning opening exercise. He also testified that he did not tell the principals what could *not* be done under the Court's order, but only what could be done and still be in compliance with the policy. Finally, he testified that most of the schools used Christmas nativity scenes around the school at Christmas.

The next witness was a high school principal. He testified that it was the current and past practice of his

11 Thus, despite the "advice" or "guidelines" issued by the Court in its December 4, 1970 order, defendant's counsel — and the Board — apparently felt that the legality of further Bible reading and distribution was not settled, but instead depended on the outcome of the current litigation.

school to have students read "inspirational" selections — usually from the Bible, both Old and New Testament — over the public address system each morning. The selections, he testified, are normally selected and read by students, often by the student council chaplain. He testified that he had the ultimate authority to approve or disapprove the selections chosen, but that he very rarely exercised his veto power. He further testified that, although he allowed an opportunity for silent prayer, by asking the students over the public address system to observe a period for silent meditation after the Bible reading, he did not allow oral prayer.

The next witness was a theologian. He testified that Christian virtue is not the equivalent of virtue in general. All Christian virtue, he testified, is dependent on faith, and Christian virtue cannot be taught properly without teaching the underlying faith. He listed faith, hope, charity, prudence, temperance, fortitude and justice as the seven classic Christian virtues.

The final witness was a rabbi, who basically confirmed the previous theologian's testimony.

On January 22, 1975, the district Court entered its final order. The gist of this order was that no declaratory judgment or injunction would issue because there was no imminent threat or likelihood of further violation of the morning exercise Bible readings and prayers and no imminent threat or likelihood of further violation of the order against Bible distribution. As to the Christian virtue statute, the Court held that there was no foreseeable irreparable injury, so

that no injunction could issue. Furthermore, the Court found that there was no threat of enforcement of the statute sufficient to create the case or controversy necessary for a declaratory judgment to issue. The Court also decided that the statute is subject to varied interpretations, implying that abstention might be appropriate in this case. The court cited *Steffel*[12] for the proposition that there must be a genuine threat of enforcement before a declaratory judgment will issue. Finally, the Court failed to clarify or even to discuss the legal effect of its December 4, 1970 order as instructed by the Fifth Circuit.

Injunctive Relief

Defendants argue that that portion of the District Court's opinion denying injunctive relief is based on the case of *United States v. W. T. Grant Co.*, 1953, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303, in which the Supreme Court set forth the governing principles for determining whether a request for injunctive relief has been *mooted* by the voluntary cessation of allegedly illegal conduct by the defendant.[13] Under that stand-

12 *Steffel v. Thompson*, 1974, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505.

13 Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 17 S.Ct. 540 [41 L.Ed. 1007] (1897); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 65 S.Ct. 11 [89 L.Ed. 29] (1944); *Hecht Co. v. Bowles*, 321 U.S. 321, 64 S.Ct. 587 [88 L.Ed. 754] (1944). A controversy may remain to be settled in such circumstances, *United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (1945, C.A.2d), e.g., a dispute over the legality of the challenged practices. *Walling v. Helmerich & Payne, Inc. (U.S.)* supra; *United Brotherhood C. & J. v. N.L.R.B.*, 341 U.S. 707, 715, 71 S.Ct. 966 [95 L.Ed. 1309, 1316] 970

ard, defendant argues, we must uphold the District Court's denial of injunctive relief, since the evidence does not show that the District Court abused the wide discretion afforded it under the *Grant* standard. We need not reach this contention of defendant's, however, for that part of the District Court's opinion which deals with injunctive relief shows clearly that the denial of injunctive relief was not predicated upon

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(1951). The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. *United States v. Trans-Missouri Freight Assn.*, supra, [166 U.S.] at 309, 310, [17 S.Ct. [540], at 546, 547]. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right, *N.L.R.B. v. General Motors Corp.*, 179 F.2d 221 (1950, C.A.2d). The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

> The case may nevertheless be moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated." The burden is a heavy one. Here the defendants told the court that the interlocks no longer existed and disclaimed any intention to revive them. Such a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts.
>
> Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. *Hecht Co. v. Bowles*, 321 U.S. 321, 64 S.Ct. 587, [88 L.Ed. 754] supra; *Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co.*, 242 U.S. 202, 37 S.Ct. 105 [61 L.Ed. 248] (1916). The purpose of an injunction is to prevent future violations, *Swift & Co. v. United States*, 276 U.S. 311, 326, 48 S.Ct. 311, 314, [72 L.Ed. 587, 597] (1928) and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.

Id., 345 U.S. at 632-33, 73 S.Ct. at 897.

the ground of mootness, but upon the ground that "there is no imminent threat of future violation" so that the "stringent judicial remedy of injunctive relief is not required."

We agree with the District Court that the imminency of harm from the recurrence of the practices complained of is not sufficient to warrant the issuance of injunctive relief. In reaching this conclusion, we are guided by the established principle of equity that "in considering whether to grant injunctive relief a court should impose upon a defendant no restriction greater than necessary to protect the plaintiff from the injury of which he complains. *See* McClintock on Equity § 146 (2d ed. 1948)." *United States v. Hunter*, 4 Cir., 1972, 459 F.2d 205, 219.

Declaratory Relief

This does not end the matter, however, for appellants have asked for both declaratory and injunctive relief. Under these circumstances, we have the "duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction."[14] *Zwickler v. Koota*, 1967, 389 U.S. 241, 254, 88 S.Ct. 391, 399, 19 L.Ed.2d 444. *See also Super Tire Engineering Co. v. McCorkle*, 1974, 416 U.S. 115, 94 S.Ct.

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14 "While a defendant may unilaterally act in such a manner as to cure the allegedly offensive conduct and foreclose the necessity for injunctive relief, that same unilateral action by the defendant may have no effect whatsoever on the necessity for declaratory judgment relief. Only when such unilateral action resolves or extinguishes all rights can the case or controversy be said to be no longer live and justiciable."
Familias Unidas v. Briscoe, 5 Cir., 1976, 544 F.2d 182 at 190.

1694, 40 L.Ed.2d 1; *Steffel v. Thompson*, 1974, 415 U.S. 452, 468-69, 94 S.Ct. 1209, 39 L.Ed.2d 505; *Roe v. Wade*, 1973, 410 U.S. 113, 166, 93 S.Ct. 705, 35 L.Ed.2d 147. This is because "different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other."[15] *Roe v. Wade, supra*, 410 U.S. at 166, 93 S.Ct. at 733.

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15 In *Steffel v. Thompson, supra*, the Supreme Court discussed the different considerations involved in granting a declaratory judgment as opposed to granting an injunction, particularly where it is a *state* statute which is being challenged. First, a declaratory judgment will have a less intrusive effect on the administration of state laws:

> "As was observed in *Perez v. Ledesma*, 401 U.S. [82] at 124-126, [91 S.Ct. [674] at 696-697] 27 L.Ed.2d 701 (separate opinion of Brennan, J):
>
> 'Of course, a favorable declaratory judgment may nevertheless be valuable to the plaintiff though it cannot make even an unconstitutional statute disappear. A state statute may be declared unconstitutional in toto — that is, incapable of having constitutional applications; or it may be declared unconstitutionally vague or overbroad — that is, incapable of being constitutionally applied to the full extent of its purport. In either case, a federal declaration of unconstitutionality reflects the opinion of the federal court that the statute cannot be fully enforced. If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute. If a declaration of partial unconstitutionality is affirmed by this Court, the implication is that this Court will overturn particular applications of the statute, but that if the statute is narrowly construed by the state courts it will not be incapable of constitutional applications. Accordingly, the declaration does not necessarily bar prosecutions under the statute, as a broad injunction would. Thus, where the highest court of a State has had an opportunity to give a statute regulating expression a narrowing or clarifying construction but has failed to do so, and later a federal court declares the statute unconstitutionally vague or overbroad, it may well be open to a state prosecutor, after the federal court decision, to bring a prosecution under the statute if he reasonably believes that the defendant's conduct is not

> constitutionally protected and that the state courts may give the statute a construction so as to yield a constitutionally valid conviction. Even where a declaration of unconstitutionality is not reviewed by this Court, the declaration may still be able to cut down the deterrent effect of an unconstitutional state statute. The persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew. Finally, the federal court judgment may have some res judicata effect, though this point is not free from difficulty and the governing rules remain to be developed with a view to the proper workings of a federal system. What is clear, however, is that even though a declaratory judgment has "the force and effect of a final judgment," 28 U.S.C. § 2201 [28 USCS § 2201], it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt.' (Footnote omitted.)"

Id., 415 U.S. 469-71, 94 S.Ct. 1221.

Second, engrafting

> "upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate.
>
> 'Were the law to be that a plaintiff could not obtain a declaratory judgment that a local ordinance was unconstitutional when no state prosecution is pending unless he could allege and prove circumstances justifying a federal injunction of an existing state prosecution, the Federal Declaratory Judgment Act would have been pro tanto repealed.' *Wulp v. Corcoran*, 454 F.2d 826, 832 (C.A.1, 1972) (Coffin, J.).

See *Perez v. Ledesma*, 401 U.S. at 116, [91 S.Ct., at 692-693] 27 L.Ed.2d 701 (separate opinion of Brennan, J.)."

Id., 415 U.S. at 471, 94 S.Ct. at 1222.

Thus, as the Court in *Steffel* emphasized,

> "The only occasions where this Court has disregarded these 'different considerations' and found that a preclusion of injunctive relief inevitably led to a denial of declaratory relief have been cases in which principles of federalism militated altogether against federal intervention in a class of adjudications. See *Great Lakes Co. v.*

The District Court found that declaratory relief could not be issued because there was no case or controversy.[16] We disagree.

The Declaratory Judgment Act's limitation to "cases of actual controversy" has regard to the constitutional provision in Article III and is operative only in respect to controversies which are such in the constitutional sense, the word "actual" being one of emphasis rather than of definition. *See, e.g., Aetna Life Insurance Co. v. Haworth*, 1937, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, *reh. denied*, 300 U.S. 687, 57 S.Ct. 667, 81 L.Ed. 889. Thus, there can be no case or controversy where parties seek adjudication of only a

Huffman, 319 U.S. 293, 63 S.Ct. 1070 [87 L.Ed. 1407] (1943) (federal policy against interfering with the enforcement of state tax laws);[20] *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764 [27 L.Ed.2d 688] (1971).

Id., 415 U.S. at 472, 94 S.Ct. at 1222.

20 In *Great Lakes Co. v. Huffman*, employers sought a declaration that a state unemployment compensation scheme imposing a tax upon them was unconstitutional as applied. Although not relying on the precise terms of 28 U.S.C. § 41(1) [28 U.S.C.S. § 41(1)], (1940 ed.), now 28 U.S.C. § 1341, [28 U.S.C.S. § 1341], which ousts the district courts of jurisdiction to 'enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State,' the Court, recognizing the unique effects of anticipatory adjudication on tax administration, held that declaratory relief should be withheld when the taxpayer was provided an opportunity to maintain a refund suit after payment of the disputed tax. 'In contrast, there is no statutory counterpart of 28 U.S.C. § 1341 [28 U.S.C.S. § 1341] applicable to intervention in state criminal prosecutions.' *Perez v. Ledesma*, 401 U.S. 82, 128, 91 S.Ct. 674, 699 [27 L.Ed.2d 701] (1971) (separate opinion of Brennan, J.)."

16 The District Court's opinion implies that appellants present an abstract or hypothetical question, because the practices complained of are not occurring at present and the statute complained of is not being currently enforced. The District Court bolsters its theory by concluding that there is no likelihood of future occurrence of these practices or of the enforcement of this statute.

political question,[17] or merely seek an advisory opinion,[18] or where the litigation presents merely an abstract, academic or hypothetical question,[19] or where the question sought to be adjudicated has been mooted by subsequent developments,[20] or where the plaintiff has no standing to maintain the action.[21]

In *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 1941, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826, the Supreme Court emphasized that the difference between an abstract question and a "controversy" contemplated by 28 U.S.C.A. § 2201 is necessarily one

17 *Schlesinger v. Reservist Committee to Stop the War*, 1974, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706; *Gilligan v. Morgan*, 1973, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407; *Powell v. McCormack*, 1969, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491; *Flast v. Cohen*, 1968, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947.

18 *Richardson v. Ramirez*, 1974, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551; *Gilligan v. Morgan, supra; Laird v. Tatum*, 1972, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154, *reh. denied*, 409 U.S. 901, 93 S.Ct. 94, 34 L.Ed.2d 165; *Golden v. Zwickler*, 1969, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113; *Flast v. Cohen, supra; United Public Workers v. Mitchell*, 1947, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754; *Federal Radio Commission v. General Electric Company*, 1930, 281 U.S. 464, 50 S.Ct. 389, 74 L.Ed. 969.

19 *North Carolina v. Rice*, 1971, 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413 (abstract question); *United Public Workers v. Mitchell, supra* (abstract question); *In re Summers*, 1945, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (abstract declaration of law), *reh. denied* 326 U.S. 807, 66 S.Ct. 94, 90 L.Ed. 491; *Aetna Life Insurance Company v. Haworth, supra*.

20 *DeFunis v. Odegaard*, 1974, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164; *Gilligan v. Morgan, supra; Roe v. Wade, supra; North Carolina v. Rice, supra; Flast v. Cohen, supra; Liner v. Jafco, Inc.*, 1964, 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347; *Aetna Life Insurance Company v. Haworth, supra*.

21 *Schlesinger v. Reservist Committee to Stop the War, supra; Richardson v. Ramirez, supra; Gilligan v. Morgan, supra; Association of Data Processing Service Organizations, Inc. v. Camp*, 1970, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184; *Flast v. Cohen*, 1968, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947.

of degree. Faced with the difficulty of fashioning a precise test for determining whether there is such a controversy in a particular case, the Court substantially avoided the problem by using an essentially circular test: "The question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[22] *Id.* at 273, 61 S.Ct. at 512.

In *Steffel v. Thompson, supra*, the Supreme Court discussed[23] and applied the case or controversy aspects of the Declaratory Judgment Act in its criminal setting. The Court there pointed out that there were two stages to the case or controversy inquiry. The first is whether the appellant's allegations are "imaginary or speculative" or whether they are, on the contrary, real and substantial.[24]

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22 In *Preiser v. Newkirk*, 1975, 422 U.S. 395, 402, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272, 278, the Supreme Court, in applying this test, emphasized that the last clause of the test — "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" — was the crux of the test.

23 *See* the discussion in note 15, *supra*, where the Court in *Steffel* discussed the different considerations applying when declaratory relief is sought rather than injunctive relief.

24 In *United States v. Scrap*, 1973, 412 U.S. 669, 688-89, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254, the Court emphasized that "pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he *has been* or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action."

In *Preiser v. Newkirk, supra*, the Court emphasized that the crux of the *Maryland Casualty* test was the phrase, "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

In *Poe v. Ullman*, 1961, 367 U.S. 497, 508, 81 S.Ct. 1752, 6 L.Ed.2d 989, the question was phrased in terms of whether or not the appellant's claim raised issues which were "chimerical."

We have no difficulty in deciding, in the case before us, that the claims raised by appellants here are not imaginary, speculative, chimerical, or a mere ingenious academic exercise in the conceivable. Appellants have demonstrated that (i) extensive Bible distribution has taken place in the fairly recent past; (ii) there is a motion to resume such Bible distribution tabled, but breathing, on the school board's agenda, waiting only for a pronouncement by this Court (or a lack of any pronouncement); (iii) morning prayer of a near compulsory nature (since the prayer was made over a loudspeaker to a "captive audience") continued until the time this suit was filed and Bible reading over the public address system still takes place in some of the public schools in the area; (iv) the morning exercise devotional and the Bible distribution were initially adopted by the school board at least in part in express reliance on the "Christian virtue" statute; and (v) the statute is not discretionary but is mandatory, since it affirmatively directs the teachers and principals to inculcate every Christian virtue.[25] Clearly, then, the first step of the test as laid down in *Maryland Casualty* and *Steffel* is satisfied. These are parties who are legal adversaries engaged in a real and substantial controversy — a controversy which is not imaginary or speculative in any sense of the word.

The second stage of the inquiry, emphasized the Court in *Steffel*, is whether or not there is a "*continuing* existence of a live and acute controversy . . . ."

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25 It is of course true that the statute has not recently been enforced by disciplinary measures. But that does not remove the potential effect of its mandatory wording or remove the possibility of disciplinary measures for non-compliance in the future, particularly if we give our implicit sanction to the statute by failing to interpret it.

Because the strike which instigated the lawsuit had ended, the Court had no difficulty in finding that injunctive relief should be denied, since the case was mooted for the purpose of granting injunctive relief. Recognizing the duty imposed by *Zwickler v. Koota, supra*, to examine requests for declaratory relief under different standards, however, the Court determined that the request for declaratory relief was embodied in a living case or controversy for the purposes of the Declaratory Judgment Act.

In reaching this conclusion, the Court applied the *Maryland Casualty* test and found that "the facts here provide full and complete satisfaction of the requirement of the Constitution's Art. III, § 2, and the Declaratory Judgment Act, that a case or controversy exist between the parties. Unlike the situations that prevailed in *Oil Workers Unions v. Missouri*, 361 U.S. 363, 80 S.Ct. 391, 4 L.Ed.2d 373 (1960), on which the Court of Appeals' majority chiefly relied, and in *Harris v. Battle*, 348 U.S. 803, 75 S.Ct. 34, 99 L.Ed. 634 (1954), the challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, *and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties.*" *Id.*, 416 U.S. at 122, 94 S.Ct. at 1698. [Emphasis supplied].

We conclude, from all the circumstances of this case, that the real and substantial controversy between these parties is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment, as that latter phrase is tempered and given meaning by the "continuing and brooding presence" language of

Id., 415 U.S. at 459, 94 S.Ct. at 1216. For, as a variety of Supreme Court cases have recognized,[26] an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. The emphasis given to the phrase "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment," from *Maryland Casualty* by the Supreme Court in *Preiser*, only underscores the two-step nature of the inquiry.

The Supreme Court's recent decision in *Super Tire Engineering Co. v. McCorkle, supra*, gives some guidance as to how immediate and real a controversy must be to justify declaratory relief.[27] In that case New Jersey workers engaged in an economic strike were eligible for public assistance through state welfare programs. Employers whose plants were struck sought an injunction against the New Jersey welfare administrators to have this practice stopped, and, in addition, sought a declaration that the New Jersey interpretative regulations according benefits to striking workers, were void.

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26 *See, e.g., Preiser v. Newkirk, supra; Roe v. Wade, supra; SEC v. Medical Comm. for Human Rights*, 1972, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560; *Golden v. Zwickler, supra; United States v. Munsingwear, Inc.*, 1950, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36.

27 In the *Grant* case (*see* note 13, *supra*), where the question was whether a request for injunctive relief had been mooted by the voluntary cessation of allegedly illegal conduct by a defendant, the Court emphasized that a heavy burden is upon the defendant to demonstrate that "there is no reasonable expectation that the wrong will be repeated." *See also DeFunis, supra*, (voluntary cessation of allegedly illegal conduct would not render a case moot only if it could be said *with assurance* that there is no reasonable expectation that the wrong will be repeated). Although the *Grant* test is not directly in point where declaratory relief is sought (*see* note 15, *supra*), it does furnish some guidance in this area.

the Supreme Court in *Super Tire Engineering Company v. McCorkle, supra*. The school board only recently barely tabled a motion to permit renewed distribution of Bibles by the Gideon Camp. Apparently, the only reason the motion did not pass is that four of the Board members were cautious enough to wait to act until they received the advice of their lawyer. Their lawyer, in turn, was cautious enough to refuse any concrete advice until the termination of this litigation. It will not suffice, either, to argue that the strong dictum in the District Court's most recent opinion will prevent Bible distribution in the future by this School Board. The District Court issued the same strong dictum at the beginning of this litigation, in its very first order in this case, but that did not prevent the Board from considering, and nearly passing, a resolution which would have allowed renewed Bible distribution.

As to the Bible reading and prayer issue, there is no longer prayer in unison, but there is still Bible reading over the loudspeaker in at least some of the area schools, to a "captive audience." The extent of this reading is unknown, because the Board has not conducted another survey since its initial survey — conducted immediately before the instigation of this litigation — indicated that nearly all of the area schools conducted morning devotionals with prayer in unison, Bible reading, and Bible distribution.[28] Finally, the testimony of the presiding officer of the school board and of one of the principals involved in-

28 Furthermore, the presiding officer of the Board, in his testimony, demonstrated a remarkable lack of knowledge of the practices of the area schools in this regard, considering his function and responsibilities.

dicated that the only policy change made by the board was to change one word — "devotional" to "inspirational."

As to the issue of the "Christian virtue" statute, it should be emphasized, first, that the initial Board policy as to Bible distribution and reading and prayer was adopted pursuant to this statute. This policy is still in effect, with only one change — the word "devotional" has been changed to "inspirational." Furthermore, it should be emphasized that the statute is mandatory — it imposes an affirmative duty on the board and on area teachers and principals. Although no one has recently been disciplined for non-compliance with the statute, the possibility of enforcement always exists. However, the question in issue here is not whether or not this statute places an unconstitutional duty upon teachers, principals and school board members, but whether it infringes upon the First Amendment rights of school children. In this context, the lack of current enforcement via disciplinary proceedings against non-complying teachers is largely irrelevant. This statute (and Board policy), by its mandatory wording, must necessarily have the effect of encouraging those teachers who are already so predisposed, to inject their particular religious beliefs into the classroom. It may have the further effect of encouraging those who are neutral, or only weakly opposed to the statute, either to comply by bringing religion into the classroom or to acquiesce in other teachers' doing so. Since we are worried today about the effect of the statute on the school children, rather than on the teachers, we refuse to accept the District Court's reasoning that, since the

statute has not been recently enforced, there is no case or controversy sufficient to issue a declaration on its constitutionality.

Under these circumstances, we conclude that there is sufficient immediacy and reality to this controversy to warrant the issuance of a declaratory judgment, under the *Maryland Casualty/Steffel* test, as read in the light of the "continuous and brooding presence" language of *Super Tire Engineering Company v. McCorkle, supra.*[29]

The Merits

Bible Reading And Prayer In Unison

In *School District of Abington Township v. Schempp*, 1963, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, the Supreme Court held that a state statute[30] which required religious exercises in public schools consisting of the reading, without comment, at the opening of each school day, of verses from the Holy Bi-

29 *See also Familias Unidas v. Briscoe, supra*, at 189:
"The declaratory judgment action has enlarged the cases that may be entertained by the courts, provided there is sufficient personal stake and adversariness. *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); *Aetna Life Ins. Co. v. Haworth, supra*. It has been stated that courts consider to some extent the public interest in the decision to give or withhold relief. *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937). There is a tendency in declaratory judgment cases to construe the mootness doctrine more narrowly. *Porter v. Lee*, 328 U.S. 246, 66 S.Ct. 1096, 99 L.Ed. 1199 (1946); *Lehigh Coal & Nav. Co. v. Central R. of New Jersey*, 33 F.Supp. 362 (E.D. Pa.1940)."

30 Included within the Court's holding were rules of a school board adopted pursuant to statutory authority.

ble and the recitation of the Lord's Prayer by the students in unison, was unconstitutional as a violation of the First Amendment's Establishment Clause, as applied to the states through the Fourteenth Amendment. The court rejected the defense of the defendant school board that the morning devotional had secular purposes, such as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature. [Even] if its purpose is not strictly religious, it is sought to be accomplished through readings without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting non-attendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for non-religious moral inspiration or as a reference for the teaching of secular subjects." *Id.*, 374 U.S. at 223-24, 83 S.Ct. at 1572.

The Court also rejected the defense that individual students were allowed to absent themselves from the exercises upon parental request, "for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. See *Engel v. Vitale*, 1962, 370 U.S. [421], at 430, 82 S.Ct. [1261], at 1266-1267, 8 L.Ed.2d 601." Finally, the Court rejected the defense that "the religious practices here may be relatively minor encroachments on the First Amendment." "The

breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . ." *Id.*, 374 U.S. at 225, 83 S.Ct. at 1573.

In this case, the school board passed a resolution calling for a five to seven minute morning exercise in every school to consist of "a period of meditation which shall include the opportunity for individual prayer and Bible reading or a devotional or meditation presented by groups or organizations or an individual" to be followed by a patriotic exercise. A survey conducted by the school board indicated that 70 of the 97 schools in Orange County were practicing daily Bible reading, generally read aloud to a class by a student or the classroom teacher. In some public schools, the Bible reading was given over the school public-address system. In some schools, the Lord's Prayer was recited. Only four of the County's 97 schools had neither prayer nor Bible reading. Clearly, these practices fall under both the rule and rationale of the *Abington* case as unconstitutional under the First Amendment, as applied to the states through the Fourteenth Amendment.

At the December 4, 1973, hearing on remand, the evidence before the District Court indicated that the school board changed only one word in its resolution since this suit was filed — the word "devotional" was changed to "inspirational."[31] Furthermore, a school board member testified that no change in the *actual*

31 With the change in wording, the amended resolution would read to require "a period of meditation which shall include the opportunity for individual prayer and Bible reading or *an inspirational* or meditation presented by groups or organizations or an individual . . . ." [Emphasis supplied].

conduct of the morning exercise was ordered. The Deputy Superintendent of Schools testified that, at the time of the December 24, 1973, hearing, the schools were providing "a period of meditation in the school system that would provide the opportunity for individual prayer or Bible reading and inspiration and meditation." Finally, a high school principal testified that it was the current and past practice of his school to have students read "inspirational" selections from the Bible over the public address system each morning. The selections are normally selected and read by students, often by the student council chaplain.

We are convinced that these minor changes in the school board policy and practice do not cure the constitutional infirmities that we have found as to the initial board resolution and practices ordered pursuant to that resolution. Specifically, we find that it is the daily Bible reading to students in a "captive audience" situation over the public address system each morning, which is violative of the First and Fourteenth Amendments.[32]

Bible Distribution

The leading case to consider the issue of the constitutionality of Bible distribution to public school children is *Tudor v. Board of Education*, 1953, 14 N.J. 31, 100 A.2d 857, 45 A.L.R.2d 729, *cert. denied*, 348 U.S.

32 The issue of oral prayer is now out of the picture, since the evidence indicates that no oral prayer is allowed or conducted in the schools. However, we emphasize that oral prayer of the type conducted when the school board resolution was first adopted would be violative of the First and Fourteenth Amendments under *Abington*.

816, 75 S.Ct. 25, 99 L.Ed. 644. In that case, the New Jersey Supreme Court held that the distribution of Gideon Bibles to children in public schools was unconstitutional as showing a preference of one religion over another by the school authorities, where the Gideon Bible, following the King James version and confined principally to the New Testament, was not acceptable to Jews and Catholics, even though the Bibles were given only to children whose parents signed a request slip therefor, since this is more than mere accommodation of, or assistance to, a religious sect.[33] In reaching this result, the Court found, upon the testimony of psychologists, that pressures would be exerted upon non-conforming pupils, thus creating an unconstitutional preference, and reasoned that pupils and parents deemed the board's use of the school system as a means of distribution as placing its stamp of approval upon the Gideon version of the Bible. Thus, the Court rejected the argument that the proposed method of distribution in no way injected any issue of the "free exercise" of religion because no one was forced to take a New Testament and no religious exercise or instrument was brought to classrooms.

In *Brown v. Orange County Board of Public Instruction*, 1960, Fla.App., 128 So.2d 181, the Court held that a complaint stated a cause of action which alleged that the distribution of Gideon Bibles in public schools, as

33 "The full force of the violation of both the State and Federal Constitutions is revealed when we perceive what might happen if a single school board were besieged by three separate applications for the distribution of Bibles — one from Protestants as here, another from Catholics for the distribution of the Douay Bible, and a third from Jews for the same privilege for their Bible." *Id.*, 100 A.2d at 866, 45 A.L.R.2d at 739.

authorized by school officials, violated the First and Fourteenth Amendment rights of school children and their parents. In reaching this conclusion, the Court observed:

> "The distribution of Gideon Bibles through the school system each year certainly approximates an annual promotion and endorsement of the religious sects or groups which follow its teachings and precepts. This distribution likewise would tend to impair the rights of plaintiffs and their children to be free from governmental action which discriminates in the free exercise of religious belief . . . ."
>
> "If the Gideons, instead of distributing the King James Bible had distributed the Douay version exclusively, or the Koran, the Moslem Bible, or the Talmud, the body of Jewish civil and canonical law, through the school system of an area whose inhabitants were strongly Protestant, we surmise that the Protestant groups would feel a sectarian resentment against the actions of the school authorities."
>
> "This question could be narrowed by suggesting that if the doctrinaire books of either the Methodist, Baptist, Presbyterian, or other of the numerous divisions of the Protestant world, were distributed through the school system to the exclusion of the other groups, considerable legal action would justifiably ensue." *Id.*, at 185.

Our research has disclosed only one federal case which has addressed the Bible distribution issue. In *Goodwin v. Cross County School District*, E.D.Ark., 1973, 394 F.Supp. 417, the District Court held among others, that the "practice . . . as approved by the School Board and permitted by the school authorities of distributing the Gideon Bible by a representative of the Society to the fifth grade students in the elementary schools of the Cross County School District is an exercise of religious character which is prohibited by the First Amendment to the Constitution as made applicable to the States by the Fourteenth Amendment." *Id.*, at 428. In reaching this conclusion, the Court placed primary emphasis[34] upon *Tudor* and its conclusion that the "public school machinery is used to bring about the distribution of these Bibles to the children . . . . In the eyes of the pupils and their parents the board of education has placed its stamp of approval upon this distribution and, in fact, upon the Gideon Bible itself . . . This is more than mere 'accom-

34 The Court also emphasized the fact that it was stipulated by the parties that, in the presentation ceremony, the Gideon representative explained to the students the places where the Gideon Society distributed partial Bibles and the activities of the Gideon Society. This, the Court said obviously "identifies the purpose of the Gideon Society." *Id.*, at 427-28. The Court then went on to quote from the foreword of the Gideon Bible:

> "The Gideons are laymen from all the various evangelical denominations, Christian business and professional men with a vital testimony for the Lord. The primary object of the Gideons is to win others to the Lord Jesus Christ, and an effective means to this end has been the wide distribution of the Word of God. The Gideons seek to spread the Bible, the Word of God, and to encourage its use as widely as possible. The Lord has opened doors for the placement of His Word among many strategic groups of the population and in places through which large and important streams of national life pass from day to day."

Id., at 428, citing from the Gideon Bible, just preceding the Foreword Page G-29.

modation' of religion permitted in the *Zorach* case [*Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952)]. The school's part in this distribution is an active one and cannot be sustained on the basis of a mere assistance to religion." *Id.*, at 428, citing *Tudor*, *supra*.

In the case before us, the Gideons have already distributed thousands of Bibles to public school children in Orange County. They have used two methods of distribution. In the first wave of distribution, the Gideons simply walked into classrooms, asked the children who would like a free Bible, and passed out the Bibles to the children who raised their hands. In the second wave of distribution, the Gideons set up a central Bible distribution point on campus, and students who wanted Bibles had to walk to the distribution center to get them. In both methods, however, the distribution took place with the permission of the school board and the local schools. It also bears repeating that the school board has only recently tabled a motion by a four to three vote which would have allowed a new wave of Gideon Bible distribution.

We are persuaded by the rationale of the above-cited cases that the distribution of Gideon Bibles to public school students violates the First Amendment. If anything, the method of distribution in the case before us is even more an encroachment upon First Amendment freedoms than was the distribution in *Tudor*, for the Board here did not make any provision for the distribution of any Bibles other than the King James version, nor did it make any provision for parents to have a say in whether or not the children would receive or

not receive the Bibles.[35] In short, the school board's use of the school system as a means of distribution amounts to its placing, at least in the eyes of children and perhaps their parents, its stamp of approval upon the Gideon version of the Bible, thus creating an unconstitutional preference for one religion over another.[36]

Christian Virtue

A Little Virtue Goes A Long Way

The final issue we must consider is whether the "Christian virtue" statute of Florida, § 231.09(2) (*see* note 2, *supra*) is unconstitutional. We conclude that it is unconstitutional as presently worded.

Over a period of many years, the Supreme Court has developed a three part test for determining whether or not a challenged state statute violates the First Amendment. *See, e g., Meek v. Pittenger*, 1975, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217, *reh. denied*, 422 U.S. 1049, 95 S.Ct. 2668, 45 L.Ed.2d 702; *Committee for Public Education & Religious Liberty v. Nyquist*, 1973, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948; *Lemon v. Kurtzman*, 1971, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745. The Court described the test recently as follows:

35 *See* note 3, *supra*.

36 We join with the Courts in both *Tudor* and *Brown* in surmising that if the tables were turned, so that it was the Douay version of the Bible, or the Koran, or the Talmud which was being distributed to public school students, the Protestant groups in the County would feel a tremendous sectarian resentment against the actions of the school authorities.

> "First, the statute must have a secular legislative purpose. *E.g., Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228. Second, it must have a 'primary effect' that neither advances nor inhibits religion. *E.g., School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844. Third, the statute and its administration must avoid excessive government entanglement with religion. *E.g., Walz v. Tax Comm'n*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697."
>
> "These tests constitute a convenient, accurate distillation of this Court's efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws 'respecting an establishment of religion,' and thus provide the proper framework of analysis for the issues presented in the case before us. It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired. *See Tilton v. Richardson*, 403 U.S. 672, 677-78, 91 S.Ct. 2091, 2095, 29 L.Ed.2d 790 (plurality opinion of BURGER, C. J.)."

Id., 421 U.S. at 358-59, 95 S.Ct. at 1760.

In *Lemon v. Kurtzman*, 1971, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, the Court stated that in

> "the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz v. Tax Commission*, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970)."

Id., 403 U.S. at 612, 91 S.Ct. at 2111.

In *Lemon*, the Court also emphasized that "in order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. Mr. Justice Harlan, in a separate opinion in *Walz, supra*, echoed the classic warning as to 'programs, whose very nature is apt to entangle the state in details of administration . . . .' *Id.*, [397 U.S.] at 695 [90 S.Ct. [1409], at 1425]." *Id.*, 403 U.S. at 615, 91 S.Ct. at 2112.

Secular Legislative Purpose

In *Epperson, supra*, the Court discussed the first part of the three part test. In that case, the State of Arkansas had passed a criminal statute making it a criminal offense for a teacher in any state school to teach the Darwinian theory of evolution. In examining this statute, the Court quoted *Abington, supra*, for the proposition that, if "either [the purpose or the primary

effect of the enactment] is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Epperson, supra*, 393 U.S. at 107, 89 S.Ct. at 272. The Court then went on to hold that these

> "precedents inevitably determine the result in the present case. The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment. It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees." [Citations omitted].
>
> "In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence. Its antecedent, Tennessee's 'monkey law,' candidly stated its purpose: to make it unlawful 'to teach any

theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.' Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to 'the story of the Divine Creation of man' as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man."

"Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution."

Id., 393 U.S. at 107-09, 89 S.Ct. at 272.

We conclude that the purpose of the "Christian virtue" part of § 231.09(2) is the advancement of a particular religion. Although our research has not disclosed any illuminating legislative history which would shed light on our task, we think it of particular significance that the Florida legislature passed a stat-

ute[37] only a few years prior to its passage of the Christian virtue statute, which made Bible reading mandatory in the public schools of Florida. This statute, which immediately preceded the Christian virtue statute in the Florida statutes, remained in effect until repealed in 1965. We think it not unreasonable to suppose that the Christian virtue statute, which was made an additional subsection to the same statute as the compulsory Bible reading statute, was meant to be complementary to that statute. A consideration of the conjunction of the two statutes, together with the extremely recent repeal of the compulsory Bible reading statute, lends persuasive weight to the theory that the Florida legislature had in mind a particular religion — the Christian religion — when it passed § 231.09(2).

More important, the very wording of the statute bespeaks a particular religious purpose. The Board and the State have argued very forcefully before us that the word "Christian" in the statute is a mere adjective with little or no import for the statute or its application. Under elemental rules of statutory con-

37 This statute, passed in 1925, provided that
"Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the county board, shall perform the following functions:
(2) Bible reading. — Have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment."
This statute was the original § 231.09(2). When the Christian virtue statute was passed in 1939, it became § 231.09(3). In 1965, when the compulsory Bible reading statute was repealed, the Christian virtue statute became § 231.09(2).

struction, we must reject this argument.[38] The evidence below is very persuasive that the phrase, "Christian virtue" suggests a very particular type of virtue — a virtue that is tied particularly to one religion, and a type of virtue that is or may be at odds with other, minority, religions' concepts of virtue. Furthermore, common sense tells us that this is so. If this statute had required the inculcation of "Jewish virtue", or "Moslem virtue", we have no doubt that the unconstitutionality of the statute would be conceded by all. We can see no forthright, honest distinction when the word "Christian" is substituted for "Jewish" or for "Moslem" in our hypothetical. We therefore conclude that the "Christian virtue" statute has as one of its major purposes the advancement of a particular religion.[39]

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38 It is an elemental rule of statutory construction that if a "statute admits a reasonable construction which gives effect to all of its provisions," a court "will not adopt a strained reading which renders one part a mere redundancy. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-539 [75 S.Ct. 513, 519-520, 99 L.Ed. 615]." *Jarecki v. J. D. Searle & Co.*, 1960, 367 U.S. 303, 307-08, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859, 863.

It is also a

> "cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

Washington Market Co. v. Hoffman, 1879, 101 U.S. 112, 115-16, 25 L.Ed. 782, 783.

39 We are unconvinced by the State's argument that "Christian virtue" is a shorthand for virtue in a general philosophical sense. If the Florida legislature had meant to achieve such an effect, they could have chosen language much better suited to the task.

Primary Effect Of The Statute

In *School District of Abington Township v. Schempp, supra*, the Supreme Court held that if the primary effect of a challenged state statute is to advance or inhibit religion, then that statute must be deemed an unconstitutional violation of the First Amendment. In the case before us, the record below reveals that the Board resolution allowing Bible reading, public prayers, and Bible distribution in the public schools was passed in furtherance of, and in reliance upon, § 231.09(2). Since we have already declared these practices unconstitutional, we can only conclude that the statute upon which the resolutions ordering these practices were grounded has a primary effect of advancing Protestant religion and inhibiting other religions.

Even if we had not already found that the statute had a religious purpose, we would still declare the statute unconstitutional because of its invalid primary effect.

We also emphasize that this statute is worded affirmatively.[40] It *requires* teachers to perform certain

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40 In *Abington, supra*, the Court stated that the "Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent — a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Id.*, 374 U.S. at 222-23, 83 S.Ct. at 1572.

We need not decide here, whether this statute, by its mandatory wording, violates the Free Exercise Clause as well as the Establishment Clause. We merely suggest that the presence of the mandatory wording in this statute renders the statute more constitutionally suspect, and in this case, unconstitutional, than would suggestive, non-mandatory wording.

tasks — "Members . . . *shall perform* the following functions: . . . embrace every opportunity to inculcate, by precept and example, . . . the practice of every Christian virtue." [Emphasis supplied]. Given the mandatory wording and the specific instruction that it is to be "*Christian*" virtue which is inculcated, then the practical effect of the statute is much more likely to be the advancement or inhibition of religion than if the statute is not mandatorily worded.

The Virtue Of The Latest If Not The Last Word

We emphasize that the downfall of this statute is its use of the word "Christian", and the effect the inclusion of that word has had on the practices of the Board of Public Instruction of Orange County and the area public schools. If the statute read exactly the same, except that the word "Christian" was excised, we would probably hold the statute constitutional. As it stands now, we have measured it against the standards set by the Supreme Court for measuring whether a statute passes muster under the First Amendment, and we have found it wanting. Section 231.09(2), as currently written, is unconstitutional.

On remand the District Court with the essential help of counsel shall shape an appropriate decree consistent with this opinion hopefully to bring this case to an end.

REVERSED and REMANDED.

GEE, Circuit Judge (concurring in part and dissenting in part):

I agree that *Abington*[1] condemns the devotional period in question here. For reasons which I will shortly suggest in another context, Mr. Justice Stewart's dissent in that case seems to me to express the sounder view; but the majority opinion is the law, and we must acknowledge and obey it.

With greater reservations, I also agree that Fla.Stat. § 231.09(2) is unconstitutional insofar as it requires teachers to inculcate "Christian" virtue in their students. The majority warily concedes that the statute would "probably" be constitutional if it merely exhorted the teachers to inculcate virtue. For my part, I cannot conceive how it could fail to be. The Constitution can hardly be read as commanding mentors to be neutral as between virtue and vice in their pupils. It is true that the catalogue of Christian virtues is, as this record indicates, well established to consist of faith, hope, love, prudence, temperance, justice and fortitude. These qualities have, I venture, commonly been more esteemed in the young than their opposites; cynicism, despair, hatred, foolishness, excess, unfairness and cowardice. But to refer to them legislatively as "Christian" virtues is, though an accurate shorthand phrase, a somewhat loaded way in which to save four words and a doubtless-irritating indication to the fastidious that Florida generally endorses the Christian faith.

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1 *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

I dissent, however, from the court's invalidating what it terms "Bible Distribution," a characterization both too loose and too cryptic for what was being done here and one which conjures up visions of the favored Gideons, admitted where all others were excluded, buttonholing pupils in halls and classrooms and pressing Testaments upon them. Something bearing some resemblance to this may once have taken place in what the majority terms "the first wave of distribution," but it is now plainly forbidden by the Board's guidelines quoted by the majority at note 3. Yet the majority apparently sees no distinction between the two procedures, lumping them both together under the one category. But the practice currently permitted by the Board's guidelines and stricken down by the majority amounts to no more than permitting all faiths who wish to do so to deposit literature at a place designated by the school, where it may be picked up by any students who want it and ignored by those who do not.

This is the "only procedure" permitted by the defendant school board's rules for handling such matter.[2] Thus, the majority decrees that all religious literature must be entirely and completely banned from the Orange County schools and cannot even be left on a table to be picked up by passers-by.[3] In so doing, it adopts a view of the First Amendment which I, for one, find startling and distressing. This is that all views and ideas may find orderly expression in the public-school forum — all, that is, *except* religious ones.

2 See text paragraph 2 in footnote 3 of the majority opinion.

3 One assumes that any detritus must now be burned by the janitor.

These are to be banned upon some wooden, non-constitutional formulation of a wall of separation between church and state. Thus, before our eyes, matters come full circle, the clock strikes thirteen, and the Monkey Trial is enacted in reverse.

There is neither need nor occasion for me to condemn at large such a crude and insensitive version of the separation of church and state. It has all been said before, and better than I could, by the Supreme Court:

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship

> would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths — these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

Zorach v. Clauson, 343 U.S. 306, 312-13, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952).

The majority, however, chooses to rest its position on *Tudor v. Board of Education*, 14 N.J. 31, 100 A.2d 857, 45 A.L.R.2d 729 (1953). Any opinion by Chief Justice Vanderbilt commands respect, and much of this one is indeed admirable. Commencing with a brief statement of operative fact, it sweeps on in its powerful course through an epitome of the historical developments leading up to the adoption of the First Amendment until, in the precise passage picked out and quoted by the majority at its note 33, it leaves the highway and comes to rest at the bottom of a vast non sequitur. The court had noted earlier that "[t]he charge here is sectarianism" and that "[t]he defendant board of education is accused of showing a preference by permitting [!] the distribution of the King James version of the New Testament . . . ."[4] It then discusses conflicts

4 100 A.2d at 864, 45 A.L.R.2d at 736.

between the New Testament and the doctrines of Judaism, concluding with the passage selected by the majority for quotation at note 33:

> "The full force of the violation of both the State and Federal Constitutions is revealed when we perceive what might happen if a single school board were besieged by three separate applications for the distribution of Bibles — one from Protestants as here, another from Catholics for the distribution of the Douay Bible, and a third from Jews for the same privilege for their Bible."

With respect, I do not see much force here or any violation unless the school board referred to proposes to select one or more sets of sacred writings for distribution *and reject all others*, an arrangement not suggested anywhere in *Tudor* or in our case. Were this the proposal, I could entirely agree with *Tudor* and with the majority. Since it is not, I do not see why our answer here should not be the same as under the First Amendment generally: let all be heard, the Jew, the Catholic, the Protestant, the Buddhist, the Athiest — all who care enough to come forward to advance or defend their views.[5] And this is precisely what the Board's guidelines, here voided, provide for.

With deference, it seems the majority's First Amendment proposal for handling religious questions amounts to silencing those who wish to speak in deference to those who do not wish or care to.

5 Subject, of course, to neutral considerations of time and space available, none of which are in issue here.

This seems to me to single out religion for especial and hostile treatment and to stand the First Amendment on its head. I dissent from it.

APPENDIX E

Marvin MELTZER, Individually and as father and next friend of David Meltzer, et al., Plaintiffs-Appellants,

versus

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, etc., et al., Defendants-Appellees.

No. 75-1423.

United States Court of Appeals, Fifth Circuit.

May 25, 1977.

Appeal from the United States District Court for the Middle District of Florida, George C. Young, Chief Judge.

Jerome J. Bornstein, Orlando, Fla., for plaintiffs-appellants.

William M. Rowland, Jr., John W. Bowen, Orlando, Fla., for defendants-appellees.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 11, 1977, 5 Cir., 1977, 548 F.2d 559).

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX F

Marvin MELTZER, Individually and as father and next friend of David Meltzer, et al.,
Plaintiffs-Appellants,

versus

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, etc., et al.,
Defendants-Appellees.

No. 75-1423.

United States Court of Appeals,
Fifth Circuit.

July 31, 1978.

Appeal from the United States District Court for the Middle District of Florida.

Before BROWN, Chief Judge, TUTTLE, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

PER CURIAM:

The panel decision, *Meltzer v. Board of Public Instruction of Orange County, Florida*, 5 Cir., 1977, 548

F.2d 559, *rehearing en banc granted*, 553 F.2d 1008, sets out the factual and procedural posture of this lawsuit. The proceedings before the United States District Court for the Middle District of Florida and the panel involved challenges to the constitutionality of the following: (1) the Orange County school board's adoption of a resolution requiring daily Bible reading and prayer in the public schools[1]; (2) the school board's approval of a resolution permitting the distribution of Gideon Bibles in the classroom by groups of Gideons[2]; (3) the school board's promulgation of guidelines for the distribution of religious literature at designated locations on the school premises[3]; and (4) Fla.Stat. § 231.09(2), the "Christian virtue" statute, which requires teachers to inculcate Christian virtues in their students.[4] The Court en banc adopts the panel's opinion reversing the District Court on issues (1) and (2). The Court en banc affirms by an equally divided vote the District Court's holding on items (3) and (4) as contained in its final order of January 22, 1975. *See, e.g., School Board of City of Richmond v. State Board of Education*, 1973, 412 U.S. 92, 93 S.Ct. 1952, 36 L.Ed.2d 771; *Rice v. Sioux City Cemetery*, 1954, 348 U.S. 880, 75 S.Ct. 122, 99 L.Ed. 693, *on rehearing*, 1955, 349 U.S. 70, 73, 75 S.Ct. 614, 99 L.Ed. 897; *United States v. Holmes*, 5 Cir., 1976, 537 F.2d 227; *Carter v. United States*, 5 Cir., 1963, 325 F.2d 697, *cert. denied*, 1964, 377 U.S. 946, 84 S.Ct. 1353, 12 L.Ed.2d 308; 5 Am.Jur.2d, Appeal and Error, § 902, pp. 338, 339.

REVERSED IN PART: AFFIRMED IN PART.

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1 See the panel's discussion of this issue, 548 F.2d at 572-74.

2 *Id.* at 572, 574-76.

3 *Id.*

4 *Id.* at 572, 576-79.

JOHN R. BROWN, Chief Judge, with whom TUTTLE, GOLDBERG, GODBOLD and LEWIS R. MORGAN, Circuit Judges join, dissenting in part:

For reasons set out in the panel's decision and amplified here, I must respectfully dissent as to issues (3) and (4).

With its equally divided vote affirming the District Court the en banc Court today reaches an extraordinary result and countenances activity which harms the principles of religious liberty embodied in the Constitution and rooted firmly in our Nation's heritage. The distribution of religious literature, particularly massive quantities of one faith's sacred scripture, through the public schools to impressionable children advances religion and encourages excessive government entanglement with religion in contravention of the Establishment Clause.[1] Similarly, Fla.Stat. § 231.09(2)[2] which in mandatory terms directs teachers to inculcate "Christian virtues" in their young pupils is unconstitutional.

1 The First Amendment of the Constitution begins:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

2 Chapter 231.09(2) of the Florida Statutes provides:
231.09 Duties of instructional personnel.
—Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the school board, shall perform the following functions:
(2) *Example for pupils.* — Labor faithfully and earnestly for the advancement of the pupils in their studies, deportment and morals, and embrace every opportunity to inculcate, by precept and example, the principles of truth, honesty and patriotism and the practice of every *Christian virtue*.
(Emphasis added).

Although a poorly developed and occasionally sparse record plagues this case, the uncontradicted portions of the record and the facts as set out in the panel decision below, 548 F.2d 559, amply delineate the existence of constitutional transgression.

I. Meltzer Mise-en-scene

A brief summary of the facts of this case reveals that the equally divided en banc Court's decision is plainly at odds with the First Amendment's principles of religious freedom. On August 24, 1970, the Orange County Board of Public Instruction held a meeting at which a member of the Gideon Camp asked permission to distribute Gideon Bibles to the students at the public schools. The request was approved. At this meeting the Board also adopted a resolution calling for a five to seven minute morning exercise in every school to consist of prayer and Bible reading. At the next meeting of the Board, on September 15, 1970, the eventual plaintiffs in this case complained to the Board that the morning exercise devotional and the distribution of Gideon Bibles violated their religious rights.

At a third meeting of the Board, counsel for the Board gave his opinion that the morning exercises were not unlawful. To support his opinion counsel cited Chapter 231.09(2) of the Florida Statutes.[3] The Board thereupon refused to modify its policy regarding opening day exercises. The morning exercise program was found to be unconstitutional by the panel and this result is affirmed by the en banc Court.

3 See note 2, *supra*.

Notwithstanding this affirmance of the panel, the unconstitutional morning devotional is relevant here to the extent it implicates the Florida "Christian virtue" statute and to the extent it reflects the general predilection of the Board to encourage an institutionalized form of religion in the public schools.

Following this third meeting, on October 7, 1970, the Board did issue guidelines for the distribution of Bibles or other religious literature.[4] Prior to the

4 TO:
ALL ORANGE COUNTY PUBLIC SCHOOL PRINCIPALS
FROM:
JAMES M. HIGGINBOTHAM
District Superintendent
SUBJECT:
RELIGIOUS BOOKS AND LITERATURE

The following guidelines have been developed by the School Board Attorneys and apply to the handling of religious books, doctrine, or literature which may be offered to the schools for distribution. These guidelines are to be reviewed by *you* in detail and are to receive *immediate implementation*.

The procedures as contained in the attached guidelines are the only procedures authorized by this office and shall be the sole method of handling material of this nature.

GUIDELINES

The following are guidelines for the principals of the Orange County District School Board schools for handling of religious books or doctrine offered to the schools for free distribution. We emphasize that we are directing these guidelines only toward religious books and doctrine not intending to modify general present policies or guidelines with regard to other literature.

1. A place be designated within the school facility for all religious books and literature which may be supplied by outside groups or organizations.
2. Books and literature be available to the students only at the designated location.
3. All faiths be allowed to provide books and literature under the terms of these guidelines.
4. No distribution nor allowing of distribution of books and literature be undertaken through the classroom, homerooms, in assembly or on any portion of school property by the staff, students or outsiders.
5. Periodic announcements may be made that literature is available at the designated place.
6. No school employee may comment upon the decision by any group to make available or not make available literature, the content of such literature, or in any way influence others concerning the literature or concerning the taking or reading of the literature.

issuance of the guidelines, groups of Gideons would go from classroom to classroom walking up and down the aisles distributing Bibles to those students who indicated they would like one. In this fashion 15,000 Bibles were distributed to the school children during class.

The October 7th guidelines were designed ostensibly to quell the religious minorities' cries of protest. Under the guidelines a location within the school facilities would be designated for the distribution of religious literature supplied by outside groups. The guidelines, however, applied only to religious literature, and permitted the periodic announcement to the pupils that the literature was available. No similar invitation was issued to other pressure interest groups such as the United States Chamber of Commerce, N.A.A.C.P., AFL-CIO, Ripon Society, Americans for Democratic Action or others who have a legitimate interest in advancing their causes through the capture of young minds. The guidelines were adopted nine days before the lawsuit was filed.

Although the guidelines might appear as a concession to the religious minorities by allowing all religions to distribute literature, as applied only the Gideons took advantage of the arrangement. More importantly, they took advantage of the guidelines to the

tune of 33,000 additional Bibles distributed after adoption of the guidelines. Apparently the distribution was made at locations highly visible to the students, such as cafeterias, by the Gideons themselves.[5] Finally, it is unclear whether the Board's January 14, 1971 Compliance Statement[6] which restricted distribution to school libraries has been implemented.

Today's decision jeopardizes fundamental First Amendment values. As Justice Clark, speaking for the Supreme Court in *School District of Abington Township v. Schempp*, 1967, 374 U.S. 203, 222, 83 S.Ct. 1560, 1571, 10 L.Ed.2d 844, 858, recognized, history teaches "that powerful sects or groups might bring about a fusion of governmental and religious functions or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits." The Board's October 7 guidelines unjustifiably encroach upon this long-accepted notion of the First Amendment's guarantee of religious liberty.

Our decision today permits young, impressionable students to receive influential dosages of one group's beliefs through repeated and massive distribution of

5 See the discussion regarding the lack of clarity in the record at note 13, *infra*.

6 Point 3 of the Statement of Compliance stated that:

> 3. Acting in the spirit of community harmony, defendants will place all religious literature which may be made available to the Orange County school system only in the libraries of the schools.

The plaintiffs filed a Statement of Noncompliance in response to the Board's Statement of Compliance.

the Bible. The children cannot help but view the school system's formal tolerance of such distribution as the placement of the community's imprimatur on this particular movement and all that it embodies. This is precisely what the Establishment Clause prohibits. One does not need to be a prophet to realize that after this Court's holding today some children in Florida schools will be coerced, pressured, or influenced into accepting one faith over others not as fortunate to receive state approval.

The Court's decision allows outsiders to influence the theological beliefs of pupils through subtle and unchecked efforts to proselytize. Although the constitutional obligation of separation of church and state is not so narrow a channel that the slightest deviation from a straight course leads to condemnation, here the course is well charted by precedent. We turn now to examine and apply the jurisprudential themes which underlie the Establishment Clause and which envelop this controversy.

II. The Constitutionality Of The 1970 Guidelines For The Distribution Of Religious Literature In Public Schools

Each state effort to promote or accommodate religion is measured against a three-tiered Establishment Clause standard. To pass muster under the Constitution the state action[7] in question must reflect a

7 The Orange County Board of Public Instruction acted in its official capacity under state law. See *Engel v. Vitale*, 1962, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601.

Furthermore, at the en banc oral argument counsel for the school board conceded that the Board's Bible distribution guidelines remain in effect and that an ongoing controversy exists as to the constitutionality of those guidelines.

clearly secular purpose, have a primary effect that neither advances nor inhibits religion, and avoid excessive government entanglement with religion. *Wolman v. Walter*, 1977, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714; *Roemer v. Maryland Public Works Board*, 1976, 426 U.S. 736, 748, 96 S.Ct. 2337, 49 L.Ed.2d 179; *Meek v. Pittenger*, 1975, 421 U.S. 349, 358, 95 S.Ct. 1753, 44 L.Ed.2d 217; *Committee for Public Education and Religious Liberty v. Nyquist*, 1973, 413 U.S. 756, 773, 93 S.Ct. 2955, 37 L.Ed.2d 948.[8] The Supreme Court views these criteria as "guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired." *Tilton v. Richardson*, 1971, 403 U.S. 672, 678, 91 S.Ct. 2091, 2095, 29 L.Ed.2d 790; *Nyquist, supra*, 413 U.S. at 773 n.31, 93 S.Ct. at 2965 n.31, 37 L.Ed.2d at 963 n.31.[9]

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8 The tripartite standard is the appropriate analytical framework from which to evaluate the Board's guidelines for the distribution of religious literature because it represents the "product of considerations derived from the full sweep of the Establishment Clause cases." *Nyquist, supra*, 413 U.S. at 772, 93 S.Ct. at 2965, 37 L.Ed.2d at 962.

9 In *Nyquist, supra*, Justice Powell pointed out that "[m]ost of the cases coming to this Court raising Establishment Clause questions have involved the relationship between religion and education. Among these religion-education precedents, two general categories of cases may be identified: those dealing with religious activities within the public schools, and those involving public aid in varying forms to sectarian educational institutions." 413 U.S. at 772, 93 S.Ct. at 2965, 37 L.Ed.2d at 962. This case falls in the former category which contains, as cited by Justice Powell, the following relevant cases: *Zorach v. Clauson*, 1952, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 ("release time" from public education for religious education); *Engel v. Vitale*, 1962, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (prayer reading in public schools); *School District of Abington Township v. Schempp*, 1963, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (Bible reading in public schools); *Epperson v. Arkansas*, 1968, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (anti-evolutionary limitation on public school study). Consequently, the principles embraced by these decisions in particular shape the evaluation of the constitutionality of the Bible distribution guidelines.

A. *The Purpose Of The Guidelines*

An examination of the record reveals that the Bible distribution guidelines fail to reflect a secular purpose. First, on their face the guidelines, entitled "Religious Books and Literature," apply solely to the distribution of *religious* literature, and expressly do not apply to the distribution of secular literature.[10] Moreover, after initially approving the Gideons' request to distribute Bibles in the classroom, the Board adopted its October 7, 1970 guidelines only nine days before the eventual plaintiffs ceased their numerous and unheeded complaints to the Board and brought this lawsuit. The record is also void of any indication that any other religious group ever approached the Board for distribution privileges or ever utilized the distribution system adopted by the guidelines. Accordingly, the guidelines necessarily facilitated the Gideons' efforts at distribution in the schools.

More significantly, the Board's pattern of conduct highlights the primarily sectarian purpose which underlies the guidelines. This is not the first attempt by the Orange County school board to accommodate religion, particularly the Gideon movement, in its public schools. In a challenge to an earlier Board authorization of Gideon Bible distribution, the Florida Second District Court of Appeals indicated that Bible distribution could not constitutionally be permitted. *Brown v. Orange County Board of Public Instruction*, 1960, Fla.App., 128 So.2d 181. Notwithstanding such notice of the potential constitutional infirmity inherent in any Bible distribution scheme, the Board

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10 See note 4, *supra*, for the text of the guidelines.

again in 1970, prior to its adoption of the 1970 guidelines (see note 4, *supra*), readily renewed this questionable practice. With the Board's permission, groups of Gideons descended on classrooms and roamed the aisles distributing Bibles to those children who indicated they would like one. At the en banc oral argument the counsel for the Board acknowledged that this form of distribution was clearly unconstitutional. Thus, despite the earlier state court ruling the Board, with no discussion, approved a highly questionable and later admittedly unconstitutional scheme.

The Board's conduct subsequent to the promulgation of the guidelines similarly evinces the nonsecular basis of the guidelines. For example, plaintiff's December 10, 1970 interrogatory No. 5 requested a variety of relevant information about the implementation of the Board's guidelines.[11] The Board's answer of February 1, 1971 stated that "no principal has responded that he has implemented the guidelines."

11 *Interrogatory No. 5.* In accordance with Defendants' guidelines as set forth in Exhibit F [see note 2, *supra*] attached to the Complaint, as to each school facility, please state:

(a) What place or places in each school facility has been designated?

(b) Have any "religious books, doctrine or literature" been offered for distribution since October 7, 1970, and, if so, please describe the contents thereof fully?

(c) Have any "religious books, doctrine or literature" been distributed to public school students since October 7, 1970, and, if so, please state what was distributed, when, where and to whom such distribution was made?

(d) Have any periodic announcements of distribution of "religious books, doctrine or literature" been made since October 7, 1970, and, if so, please state when, by whom, what was said, and how such announcement was made.

Because the Board acknowledged that thousands of Bibles had been distributed following adoption of the guidelines, this curt response tends to show that the Board failed to make any conscientious effort to enforce the guidelines or to even give an adequate answer to the interrogatory. Furthermore, there exists no indication that the Board's Statement of Compliance of January 13, 1971, which modified the guidelines by limiting distribution to the libraries, was ever complied with, enforced, or even circulated.[12] In fact, evidence at the March 8, 1971 compliance hearings indicated that Bible distribution may not have been limited to the libraries. By a deposition incorporated in the record at the compliance hearing, Mr. Consider, the Bible Secretary of the Gideon Camp, testified that distributions had occurred in areas such as school picnic grounds and school cafeterias.[13]

Finally, the record reveals that the Gideon Camp

12 See note 6, *supra*.

13 The precise period over which distributions occurred is unclear from the record. Although Mr. Consider testified that 48,000 Bibles were distributed "within a four week total period" from the time the Gideons were initially given permission to distribute Bibles on August 24, 1970, this is at variance with other portions of his testimony. Mr. Consider testified that 15,000 Bibles were distributed through the classroom prior to the promulgation of the October 7, 1970 guidelines and that an additional 33,000 Bibles were distributed after the adoption of the guidelines. But the guidelines were adopted more than six weeks after the Gideons' initial request was approved. Thus it is unclear from the record within what period of time the 33,000 Bibles were distributed and whether the distribution at non-library locations occurred after the issuance of the compliance statement. Determination of the precise period during which the Bibles were distributed, however, does not affect the conclusion that the guidelines themselves are unconstitutional. Instead, a determination that the Board ignored its own compliance statement further demonstrates the Board's willingness to facilitate Bible distribution.

again, on two separate occasions in August and September 1973, clearly after issuance of the 1970 guidelines, requested permission to distribute Bibles in the schools. The Board tabled the request by a 4-3 vote to await counsel's legal opinion on the outcome of this litigation. Thus, despite the strong dictum issued by the District Court in an earlier order,[14] the Board apparently felt that the legality of further Bible distribution was not settled, but instead depended on the outcome of the current litigation. Consequently, this negative action demonstrated the Board's desire, or at least continued willingness, to sanction Bible distribution for particular groups or sects.

Considered as a whole the record portrays a pattern of conduct which manifests the Board's predilection to encourage particular religions and in doing so to promote most particularly the aims of the Gideon movement. In the face of rulings by both the Florida state court and the federal District Court which indicated the likely constitutional infirmity of a Bible distribution scheme, the Board's conduct exhibits a sectarian commitment to Bible distribution, sectarian in the sense that the Board thought availability of Bibles was for religious values, not, say, as instruments of good literature. Such conduct also exposes the Board's disregard for the enforcement of the guidelines themselves. It is inescapable that the Gi-

14 The order of December 4, 1970 denied a temporary restraining order on the grounds that the plaintiffs had failed to adduce sufficient evidence to show the possibility of irreparable injury, or to make findings of fact as to the Bible distribution. In strong dictum, however, the District Court pointed out that the earlier Florida case, *Brown v. Orange County Board of Public Instruction*, Fla.App.1960, 128 So.2d 181, could be read to prohibit distribution of Bibles in the schools.

deon campaign principally, if not exclusively, motivated the Board's promulgation of the guidelines and, correspondingly, that a primarily sectarian purpose underlay those guidelines.

B. The Effect Of The Guidelines

The effect of the school board's guidelines is also a constitutionally proscribed one. While the Supreme Court permits accommodation of religion in certain instances, it has generally strived for more precise principles to evaluate each promotion of a religious interest. One principle began developing in *Everson v. Board of Education*, 1947, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, when Justice Black asserted that neither a state nor the federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another." 330 U.S. at 15, 67 S.Ct. at 511, 91 L.Ed. at 723. The nondiscrimination principle embodied within this phrase has been reaffirmed several times.[15] *Torcaso v. Watkins*, 1961, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982, expanded the principle, arguing that "neither a State nor the Federal Government can constitutionally ... pass laws or impose requirements which aid all religions as against non-believers...." 367 U.S. at 495, 81 S.Ct. at 1683, 6 L.Ed.2d at 987. Finally, the Supreme Court declared in *Gillette v. United States*, 1971, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168, that "the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be

15 *E.g., Epperson v. Arkansas*, 1968, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228; *School District of Abington Township v. Schempp*, 1963, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844.

secular in purpose, evenhanded in operation, and neutral in primary impact." 401 U.S. at 450, 91 S.Ct. at 836, 28 L.Ed.2d at 181. These cases outline a non-discriminatory impact principle that requires state action to be neither facially discriminatory nor discriminatory in impact. The Orange County school board's guidelines offend this principle and thereby violate the Establishment Clause.[16]

First, the guidelines facially apply only to religious books and literature thereby discriminating between religion and non-religion. More significant, more than just being discriminatorily selective, this shows that the guidelines were not intended to assure a source of religious works for study as literature for their literary qualities. Equally important, the guidelines expressly relate to such religious material provided or offered by outsiders. Thus, the Board has established by regulation a formalized system for the distribution of religious literature without making any similar provision for the distribution of secular literature.[17] Additionally, as applied the guidelines

16 For an informative distillation of the major Supreme Court Establishment Clause themes see the discussion in Comment, 62 Va.L.Rev. 237 (1976).

17 The record sheds no light on Board policies concerning the distribution of secular literature that was provided or offered to the school by outsiders. At the en banc oral argument counsel for the Board acknowledged that he would be "troubled" if the Board had not made similar guidelines for the distribution of secular literature. According to counsel the absence of similar regulations would tend to show Board favoritism of religion. Counsel, even though "troubled," informed the Court that he had made no effort to determine what policies the Board entertained as to the distribution of outside secular literature. Thus, counsel could not tell the Court whether there existed designated tables or places for the distribution of secular materials.

advance particularly the Gideon faith. Only the Gideons initially in 1970 requested permission to distribute religious literature. Only the Gideons have made repeated requests for permission to distribute religious literature. Only the Gideons have utilized the distribution scheme established by the guidelines. Finally, the guidelines are uniquely tailored to the Gideon movement which has as one of its principle missions the distribution of Bibles.

Because the guidelines, and operations thereunder, inevitably encourages proselytization both are equally vulnerable. Indeed, in its most innocent purpose, the Board intended that all faiths be given, free of cost, facilities and space together with a large group of prospective readers to compete with other faiths for the minds and wills of these children. The state was thus providing space, facilities, and most important, a large audience.[18] Moreover, with over 48,000 Bibles distributed the plain desire of the Gideons was to proselytize believers or nonbelievers into acceptance of their theological beliefs.

The conclusion that the Board's guidelines have an impermissible effect is bolstered by precedent. The leading case to consider the issue of the constitutionality of Bible distribution to public school children is *Tudor v. Board of Education*, 1953, 14 N.J. 31, 100 A.2d 857, 45 A.L.R.2d 729, *cert. denied*, 348 U.S. 816, 75 S.Ct. 25, 99 L.Ed. 644. In that case the New Jersey

18 Furthermore, Mr. Considder's testimony, note 13, *supra*, also revealed that Gideons themselves manned the designated distribution locations. The irresistible temptation for proselytizing, even subtly so, by the Gideons who man the distribution points cannot be underestimated.

Supreme Court held that the distribution of Gideon Bibles to public school children was unconstitutional. The Court reasoned that the "public school machinery is used to bring about the distribution of these Bibles to the children .... In the eyes of the pupils and their parents the Board of Education has placed its stamp of approval upon the distribution and, in fact, upon the Gideon Bible itself .... The school's part in this distribution is an active one and cannot be sustained on the basis of a mere assistance to religion." 14 N.J. at 51, 100 A.2d at 868, 45 A.L.R.2d at 741. The similar holdings by two other courts in *Goodwin v. Cross County School District*, E.D.Ark., 1973, 394 F.Supp. 417, and *Brown v. Orange County Board of Public Instruction*, 1960, Fla.App., 128 So.2d 181, were grounded on the *Tudor* rationale. In the present case the periodic announcements of the availability of the religious literature reinforces the Board's imprimatur of the Gideon Bible.

These comments are an extension of *Engel v. Vitale*, 1962, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601, where the Supreme Court, without the citation of a single case and with only a single dissent, struck down a New York school board's requirement that an official state nondenominational prayer be recited in the public schools at the beginning of each day. In *Engel* the Court found that "it is no part of the business of government to compose official prayers" and that government should "leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." 370 U.S. at 425, 435, 82 S.Ct. at 1264, 1269, 8 L.Ed.2d at 605, 610. Similarly, in the present case it is not the business of

government to endorse religion by maintaining on school premises a location for the distribution of religious literature brought into the school by members who unquestionably seek to persuade others to their particular faith. The desire of these outsiders whose gifts are accepted by the school belies its impact: it is offered to persuade, to influence adoption of a faith.

C. The Church-State Entanglement Created By The Guidelines

Analysis under the third tier of the Establishment Clause standard reveals that the Board's guidelines foster an excessive government entanglement with religion. In *Tilton v. Richardson*, 1971, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790, an Establishment Clause case which permitted public aid to private religious universities, Chief Justice Burger's plurality opinion outlines three factors which have a relevant bearing on the analysis of the Board's guidelines. First, the Court pointed out that indoctrination is more likely where students are younger, less experienced, less skeptical, and more impressionable. The distribution efforts involved here are aimed at just such students — those in elementary and secondary schools. These young children cannot help but be influenced by the school's approval of the presence of Gideon Bibles as being in itself an approval of Gideon doctrine, lest why else would the books be allowed. Second, the aid in the present case is clearly of an ideological nature — the distribution of the Bible, an instrument of religion which cannot be gainsayed. Finally, the Court in *Tilton* warned against permitting aid of a continuing nature. In the present case the Gideons have

made repeated visits to the schools and have even made a request, though tabled by the Board, to allow even further distribution efforts.

The Board may also find itself effectively defining religion or censoring the content of religious materials. With periodic announcement of the availability of each faith's literature allowed by the guidelines, the secular public school system could become the focal point for the competition of all religious beliefs. The Courts and other state officials would be under a continuing duty to make certain that one faith was not in effect being endorsed and promoted by its monopolistic use of the distribution network or by the tone or content of the school's periodic announcements. Indeed, it is ironic that the more fairly and objectively the guidelines are enforced, the more the school board will become immersed in serious religious judgments.

We hasten to add that without question a course in comparative religion would be constitutionally permissible. Nothing said above conflicts with the Supreme Court's pronouncement that "[w]hile study of religions and of the Bible from a literary and historic viewpoint, presented objectively, as part of a secular program of, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which aid or oppose any religion." *Epperson v. Arkansas*, 1968, 393 U.S. 97, 106, 89 S.Ct. 266, 271, 21 L.Ed.2d 228, 236. Here, however, we are not discussing a detached academic exercise. Instead, we are discussing massive dosages of religious literature to chil-

dren of an impressionable age. The First Amendment's protection of the religious liberty of these children and of all beliefs alike compels me to find the Orange County school board's Bible distribution guidelines unconstitutional.

III. The Christian Virtue Statute

Our equally divided vote on the issue of the constitutionality of the "Christian virtue" statute of Florida, § 231.09(2) (see note 2, *supra*) reflects a concern that the claim is imaginary, speculative, and of insufficient immediacy to warrant the issuance of a declaratory judgment. I have no difficulty in concluding that the "Christian virtue" statute is sufficiently implicated in the activities of the Board to wholly justify declaratory relief. First, the Board sustained its policy permitting Bible distribution, and Bible readings and prayer by relying in part upon the statute.[19] Moreover, this policy is still in effect. Finally, the statute is in mandatory terms — it imposes an affirmative duty on the state's instructional personnel to inculcate Christian virtues. Although no one has been disciplined recently for noncompliance with the statute, this reflects primarily the teacher's, principal's, and Board's acceptance of the statute and its aim — the inculcation of Christianity.

Having concluded that a case or controversy exists, I adhere fully to the determination by the panel below as to the unconstitutionality of the statute. I cannot improve on what I said for the panel:

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19 In an opinion letter dated September 28, 1970 counsel for the Board stated that such policy "aids school officials to carry out their specific duties set forth in § 231.09 . . . ."

We conclude that the purpose of the "Christian virtue" part of § 231.09(2) is the advancement of a particular religion. Although our research has not disclosed any illuminating legislative history which would shed light on our task, we think it of particular significance that the Florida legislature passed a statute[37] only a few years prior to its passage of the Christian virtue statute, which made Bible reading mandatory in the public schools of Florida. This statute, which immediately preceded the Christian virtue statute in the Florida statutes, remained in effect until repealed in 1965. We think it not unreasonable to suppose that the Christian virtue statute, which was made an additional subsection to the same statute as the compulsory Bible reading statute, was meant to be complementary to that statute. A consideration of the conjunction of the two statutes, together with the extremely recent repeal of the compulsory Bible reading statute, lends persuasive weight to the theory that the Florida legislature had in mind a particular religion — the Christian religion — when it passed § 231.09(2).

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37 This statute, passed in 1925, provided that:

"Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the county board, shall perform the following functions:

(2) Bible reading. — Have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment."

This statute was the original § 231.09(2). When the Christian virtue statute was passed in 1939, it became § 231.09(3). In 1965, when the compulsory Bible reading statute was repealed, the Christian virtue statute became § 231.09(2).

More important, the very wording of the statute bespeaks a particular religious purpose. The Board and the State have argued very forcefully before us that the word "Christian" in the statute is a mere adjective with little or no import for the statute or its application. Under elemental rules of statutory construction, we must reject this argument.[38] The

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38 It is an elemental rule of statutory construction that if a "statute admits a reasonable construction which gives effect to all of its provisions," a court "will not adopt a strained reading which renders one part a mere redundancy. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-539 [75 S.Ct. 513, 519-520, 99 L.Ed. 615]." *Jarecki v. J. D. Searle & Co.*, 1960, 367 U.S. 303, 307-08, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859, 863.

It is also a

"cardinal rule of statutory construction that significance and effect shall, if

evidence below is very persuasive that the phrase, "Christian virtue" suggests a very particular type of virtue — a virtue that is tied particularly to one religion, and a type of virtue that is or may be at odds with other, minority, religions' concepts of virtue. Furthermore, common sense tells us that this is so. If this statute had required the inculcation of "Jewish virtue", or "Moslem virtue", we have no doubt that the unconstitutionality of the statute would be conceded by all. We can see no forthright, honest distinction when the word "Christian" is substituted for "Jewish" or for "Moslem" in our hypothetical. We therefore conclude that the "Christian virtue" statute has as one of its major purposes the advancement of a particular religion.[39]

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possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

39 We are unconvinced by the State's argument that "Christian virtue" is a shorthand for virtue in a general

philosophical sense. If the Florida legislature had meant to achieve such an effect, they could have chosen language much better suited to the task.

Primary Effect Of The Statute

In *School District of Abington Township v. Schempp, supra*, the Supreme Court held that if the primary effect of a challenged state statute is to advance or inhibit religion, then that statute must be deemed an unconstitutional violation of the First Amendment. In the case before us, the record below reveals that the Board resolution allowing Bible reading, public prayers, and Bible distribution in the public schools was passed in furtherance of, and in reliance upon, § 231.09(2). Since we have already declared these practices unconstitutional, we can only conclude that the statute upon which the resolutions ordering these practices were grounded has a primary effect of advancing Protestant religion and inhibiting other religions.

Even if we had not already found that the statute had a religious purpose, we would still declare the statute unconstitutional because of its invalid primary effect.

We also emphasize that this statute is worded affirmatively.[40] It *requires* teachers to perform certain tasks — "Members . . . *shall perform* the following functions: . . . embrace every opportunity to inculcate, by precept and example, . . . the practice of every Christian virtue." [Emphasis supplied]. Given the mandatory wording and the specific instruction that it is to be "*Christian*" virtue which is inculcated, then the practical effect of the statute is much more likely to be the advancement or inhibition of religion than if the statute is not mandatorily worded.

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40 In *Abington, supra*, the Court stated that the "Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent — a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Id.*, 374 U.S. at 222-23, 83 S.Ct. at 1572.

> We need not decide here, whether this statute, by its mandatory wording, violates the Free Exercise Clause as well as the Establishment Clause. We merely suggest that the presence of the mandatory wording in this statute renders the statute more constitutionally suspect, and in this case, unconstitutional, than would suggestive, non-mandatory wording.

The Virtue Of The Latest If Not The Last Word

> We emphasize that the downfall of this statute is its use of the word "Christian" and the effect the inclusion of that word has had on the practices of the Board of Public Instruction of Orange County and the area public schools. If the statute read exactly the same, except that the word "Christian" was excised, we would probably hold the statute constitutional. As it stands now, we have measured it against the standards set by the Supreme Court for measuring whether a statute passes muster under the First Amendment, and we have found it wanting. Section 231.09(2), as currently written, is unconstitutional.

548 F.2d at 578-79.

The statute, like the Bible distribution scheme, deviates in an unconstitutional course from the First Amendment proscription against an establishment of religion, and I find both repulsive to that principle.

GEE, Circuit Judge, with whom COLEMAN, Circuit Judge, joins, concurring in part and dissenting in part:

For the reasons stated in my concurrence and partial dissent to the panel opinion, 548 F.2d 559, 579-81, I agree with the conclusion of the dissent (Part III) that the "Christian virtue" statute is unconstitutional. For the reasons also stated there, I most thoroughly disagree with both the reasoning and conclusion of the dissent that providing a place in a public school where the partizans of any faith who wish to do so may merely *deposit* literature to be picked up or ignored by students violates the First Amendment. To advance such notions in the name of defending religious liberty is to make a desolation and call it peace, to suggest that all competing ideas may have their day in the market place *except* religious ones.

It is very plain that the Founders had no such thing in mind, see generally Berns, The First Amendment and the Future of American Democracy 1-32 (Basic Books, Inc., 1976). I am surprised that my dissenting Brothers feel their views sufficiently advanced beyond the Founder's conceptions to mandate, confidently if for today ineffectually, a general extirpation by prior restraint of all religious ideas from the milieu where most children spend most of their waking hours and acquire most of their ideas.